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No. 97-——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BROWNING-FERRIS, INC., *et al.*,
Petitioners,

v.

SUN COMPANY, INC., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 12, 1997

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QUESTION PRESENTED

Whether an action for contribution brought by and against potentially responsible parties for an allocation of liability for response costs under section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9613(f)(1), is subject to the limitations period for a "cost recovery" action under section 107(a)(4)(B) (42 U.S.C. § 9613(g)(2)) or the shorter statute of limitations for contribution actions under section 113(f) (42 U.S.C. § 9613(g)(3)), and if CERCLA § 9613(g)(3) controls, what constitutes the appropriate limitations period in cases where cleanup costs are incurred in response to administrative orders other than those enumerated therein.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

Petitioner Browning-Ferris, Inc. ("BFI"), a Delaware corporation, is a wholly owned subsidiary of BFI Waste Systems of North America, Inc. Petitioner BFI has no subsidiaries.

Petitioner Beverage Products Corp. ("BPC"), an Oklahoma corporation, is a wholly owned subsidiary of Midland Bottling Co. ("Midland"). Midland is a wholly owned subsidiary of Frito-Lay, Inc. Frito-Lay is a wholly owned subsidiary of Recot, Inc. Recot is a wholly owned subsidiary of PepsiCo, Inc. Petitioner BPC has no subsidiaries.

Petitioner National Tank Co. ("National"), a Delaware corporation, is a wholly owned subsidiary of NATCO Holding, Inc. NATCO is a wholly owned subsidiary of Cummings Point Industries, Inc. Petitioner National has one non-wholly owned subsidiary, NATCO Japan Company, Ltd.

Petitioner Atlantic Richfield Company ("ARCO"), a Pennsylvania corporation, has no parent corporations. ARCO holds a controlling equity interest in the following corporate entities: ARCO Chemical Company; Canyon Fuel Co., LLC; Carson Cogeneration Co.; CH-Twenty, Inc., Logan Aluminum Inc.; and Vastar Resources Inc. Petitioner ARCO also holds equity interests in each of the corporate entities (many of which are wholly owned subsidiaries) listed in the Appendix to this Petition for Certiorari, beginning at Pet. App. 49a.

Petitioner Borg Industrial Group Inc., an Oklahoma corporation, d/b/a American Container Services has no corporate parents or subsidiaries.

Petitioner Waste Management of Oklahoma, Inc. ("WMOI"), an Oklahoma corporation, is a wholly owned subsidiary of Waste Management of North America, Inc. ("WMNAI"). WMNAI is a wholly owned subsidiary of Waste Management, Inc. Petitioner WMOI has no subsidiaries.

PARTIES

The following parties to the decision below, all of whom were named as defendants in this action, appear as petitioners in this Court: Browning-Ferris, Inc.; Beverage Products Corp.; National Tank Co.; The City of Sand Springs, Oklahoma; Atlantic Richfield Company; Borg Industrial Group Inc. d/b/a American Container Services; and Waste Management of Oklahoma, Inc.

The plaintiffs who brought this action, Sun Company, Inc. (R&M) and Texaco Inc., appear as respondents in this Court.

The following parties to the decision below, all of whom were named as defendants in this action, appear as nominal respondents in this Court pursuant to Rule 12.6 of the Rules of this Court: Ark Wrecking Company of Oklahoma, Inc.; Housing Authority for the City of Tulsa, Oklahoma; Pedrick Labs; John Doe d/b/a Pedrick Labs; Art Weedin; Cowen Construction, Inc.; Peevy Construction Co. Inc.; Monte Shipley; Sun Chemical Corporation; Ozark Mahoning Company; Public Service Company of Oklahoma; Bancoff Oil Company; Consolidated Cleaning Service Co.; Charles Forhan d/b/a D&W Exterminating; Oil Capital Trash Services, Inc.; Steve Richey d/b/a Richey Refuse Service; Estate of John D. Shipley, Deceased; Shipley Refuse; Robert E. Sparks d/b/a Tulsa Industrial Services; Union Carbide Corp.; Bank IV Oklahoma, N.A.; Stan Doyle; Flemings Roofing and Sheet Metal Co.; Grant Gill d/b/a Gill Sanitation; Insulation Services, Inc.; WRG Construction Company, Inc.; W.R. Grimshaw d/b/a WRG Construction Company, Inc.; Tulsa County Public Facilities Authority; James P. Evatt; F&G Excavation; John Doe d/b/a F&G Excavation; Nellie Farris; First Tower Construction; John Doe d/b/a First Tower Construction; Marvin R. Hall; Sm Roof; John Doe d/b/a Sm Roof; Estate of Ross Scoggins, Sr., Deceased; Tandy Industries, Inc.; W&D Building; John Doe d/b/a W&D Building; Wade Trash; John Doe d/b/a Wade Trash; Compass Industries, Inc.; Estate of

Jack Dyer, Deceased; Roy L. Farris; Noland Construction Co.; John Doe d/b/a Noland Construction Co.; Mannon Trucking; John Doe d/b/a Mannon Trucking; Mobile Waste Controls; John Doe d/b/a Mobile Waste Controls; Tulsa Tank Cleaning; John Doe d/b/a Tulsa Tank Cleaning; Apartment Container Service, Inc.; Carnes Brothers Construction Company; Crain Displays & Exhibits, Inc.; Dow Chemical Company d/b/a Dow Industrial Service; Empire Roofing & Insulation Company; Tom Farris d/b/a Gene's Septic Tank Service; Odean Garrison; Langston Contractors, Inc.; Petroleum Contractors Corporation; Vacuum & Pressure Tank Truck Services, Inc.; Glenn E. Wynn, Jr.; Anchor Paint Mfg. Co.; Amron, Inc.; Tulsa Construction & Management, Inc.; Pet Care Cemetary; John Doe d/b/a Pet Care Cemetary; J.B. Stallings d/b/a Stallings Construction Company; Brierly Plumbing Technologies; Roto-Rooter Sewer Service; O.K. Tank Trucks, Inc.; American Septic Tank; John W. Diffee, Deceased, d/b/a Diffee Trash Services; and Walter C. Deppe, Deceased.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that this Court grant certiorari to review the decision of the U.S. Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 124 F.3d 1127 and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page 1a. The decision of the U.S. District Court for the Northern District of Oklahoma, entering summary judgment in favor of petitioners on statute of limitations grounds as to plaintiff-respondents' contribution claims under section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9613(f)(1), is published at 919 F. Supp. 1523 and is reproduced in the Appendix beginning at Pet. App. 16a. The district court's order denying reconsideration is published at 926 F. Supp. 170 and is reproduced in the Appendix beginning at Pet. App. 33a.

JURISDICTION

The court of appeals entered judgment on August 14, 1997. On November 4, 1997, Justice Breyer, as Circuit Justice for the Tenth Circuit, granted petitioners' application for an extension of time in which to seek certiorari, to and including December 12, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statutes involved in this case are CERCLA §§ 107(a) and 113(f), 42 U.S.C. §§ 9607(a), 9613(f). These provisions are reproduced in the Appendix, beginning at Pet. App. 38a.

STATEMENT OF THE CASE

This case presents an important issue that arises frequently in CERCLA litigation—namely, the proper relationship between cost recovery actions under CERCLA § 107(a), 42 U.S.C. § 9607(a), and contribution actions under CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1). All Circuits to consider the question (including the Tenth) have ruled that actions by and between potentially responsible parties ("PRPs") who have contributed to the release of hazardous substances at a facility are, as a matter of law, contribution actions subject to section 113(f), and thus such parties may not bring a section 107(a) action to shift their costs of responding to a hazardous waste site onto other PRPs.[1] Because, under

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[1] *See Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3364 (U.S. Nov. 10, 1997) (No. 97-795); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States* v. *Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *see generally Halliburton*, 111 F.3d at 1120 (noting that "[e]very court of appeals that has examined this issue has come to the same conclusion").

this weight of authority, an action by and between such PRPs is necessarily an action for contribution, the logical conclusion, supported by the decisions of several other Circuits and the CERCLA text itself, would be that such an action is governed by the three-year statute of limitations for contribution actions, 42 U.S.C. § 9613(g)(3), not the six-year statute of limitations for cost recovery actions, 42 U.S.C. § 9613(g)(2)(B).

Incredibly, however, the Tenth Circuit in this case, following reasoning adopted only by the Ninth Circuit, reached precisely the opposite result. The court below ruled that even though an action by and between PRPs cannot be brought under CERCLA § 107(a), the six-year statute of limitations for section 107(a) actions—*not* the considerably shorter statute of limitations enacted by Congress for contribution actions—applies to contribution actions seeking an allocation of costs incurred in response to orders other than those enumerated in section 9613(g)(3), 42 U.S.C. § 9613(g)(3). Pet. App. 12a-13a.

In reaching this schizophrenic result, in which contribution suits are regarded as cost recovery actions for one purpose (statute of limitations) but not others (*e.g.*, burden of proof and measure of recovery), the Tenth Circuit expressly rejected the Third Circuit's ruling in *In re Reading Co.*, 115 F.3d 1111 (1997), that contribution and cost recovery actions are mutually exclusive and non-overlapping (Pet. App. 14a), a view also held by the First, Fifth and Eleventh Circuits. By engrafting the cost recovery statute of limitations upon contribution actions to allocate the costs of cleanups undertaken in response to agency orders not enumerated in section 9613(g)(3), the court of appeals added to the confusion in the lower courts as to the proper limitations period for contribution actions involving such cleanups. This state of confusion among the lower courts on a matter as fundamental as the proper statute of limitations warrants this Court's review.

Statutory Background

When it enacted CERCLA, 42 U.S.C. § 9601 *et seq.*, in 1980, Congress intended to achieve two broad goals. These were to facilitate the prompt cleanup of hazardous waste sites across the Nation and to shift the cost of remediation at those sites to those responsible in some way for the discharge of hazardous substances into the environment. See *Meghrig* v. *KFC Western, Inc.*, 116 S. Ct. 1251, 1254 (1996). CERCLA § 107(a) identifies four categories of "covered persons" (called PRPs) who, absent the protection of one of the narrow defenses set forth in CERCLA § 107(b), 42 U.S.C. § 9607(b), "shall be liable" for costs resulting from containing and cleaning up toxic waste sites.[2] *Id.* § 9607(a).

As courts have noted, "Congress passed CERCLA in great haste and in the process left many holes in its framework for courts to fill in." *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1499 (11th Cir. 1996). Two of the more significant omissions from the statute as originally enacted were a right to contribution and a statute of limitations for cost recovery claims. The contribution issue became particularly important because the federal courts ruled that the specie of liability created by CERCLA was not only strict, but also joint and several. See, *e.g.*, *OHM Remediation Servs.* v. *Evans Cooperage Co.*, 116 F.3d 1574, 1581 (5th Cir. 1997). Courts responded to the inequity of joint and several liability by "find[ing] an implicit, federal common law right to contribution." *Id.*; see generally *Mardan Corp.* v. *C.G.C.*

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[2] These PRPs are: (1) the current "owner and operator" of a vessel or a facility; (2) any person who "owned or operated" any facility at the time hazardous substances were disposed there; (3) any person who "arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances" at a facility or incineration vessel containing hazardous substances; and (4) any person who "accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release . . . , of a hazardous substance." 42 U.S.C. § 9607(a).

Music, Ltd., 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (citing cases). Despite these precedents, the existence of a right to contribution under CERCLA remained uncertain given two rulings from this Court in the early 1980s that refused to create implied rights of action for contribution under other federal statutes. See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (antitrust laws); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981) (Title VII/Equal Pay Act).

With the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, Congress supplied both the cause of action for contribution and the statute of limitations omitted from the original legislation. SARA added, for the first time, an express right of action for a PRP who believes it has paid more than its fair share of the response costs stemming from a hazardous waste cleanup to seek contribution from other PRPs. CERCLA § 113(f) provides, in pertinent part, as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

42 U.S.C. § 9613(f)(1). "It was only upon passage of section 113 that [PRPs] had a clear, statutory right to seek an equitable division of clean-up costs." *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997).

In the wake of SARA, therefore, there are two different types of legal actions by which some or all of the costs associated with cleanups can be recovered: cost recovery

actions under CERCLA § 107(a) and contribution actions under CERCLA § 113(f)(1). Although Congress did not define the term "contribution" in SARA, courts have uniformly recognized that Congress intended the term to have its "generally accepted legal meaning," which is "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.'" *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995).

In an effort not to repeat its mistake of the past, Congress provided a statute of limitations for the new statutory right of contribution, CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3). Section 113(g)(3) provides as follows:

> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to *de minimis* settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

Id.

Finally, SARA added CERCLA § 9613(g)(2), a binary statute of limitations for "[a]n initial action for recovery of the costs referred to in section 9607." Where, as here, those costs were incurred in connection with a "remedial action," as opposed to a "removal action," the lawsuit generally must be brought "within 6 years after initiation of physical on-site construction of the remedial action."[3] 42 U.S.C. § 9613(g)(2)(B). The limitations

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[3] A "remedial action" includes "those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause sub-

period is, as a general rule, half that period for cost recovery actions relating to removal actions, which must be brought "within 3 years after completion of the removal action." *Id.* § 9613(g)(2)(A).

Factual Background

As the court of appeals noted (Pet. App. 3a), the following facts are undisputed. From 1972 to 1976, a now-abandoned limestone quarry located on the south bank of the Arkansas River in Tulsa County, Oklahoma (the "Site") was operated as a landfill. During this period, hazardous substances were transported to and deposited in the landfill from various sources. Over time, those substances seeped into the soil, surface water and ground water near the Site. In September 1984, the Environmental Protection Agency ("EPA") added the Site to the "National Priorities List," 40 C.F.R. part 300, app. B, which is a nationwide listing of high priority sites for decontamination. Three years later, on September 29, 1987, the EPA issued a "Record of Decision" ("ROD") outlining a plan for decontaminating the Site in accordance with the "National Contingency Plan," a series of EPA regulations setting forth procedures and standards for responding to releases of hazardous substances, pollutants and contaminants. See 40 C.F.R. part 300.

Having devised a plan for decontaminating the Site, the next step was for the EPA to determine who should implement it. After investigation, the EPA identified plaintiff-respondents Sun Company, Inc. (R&M) and Texaco, Inc. (collectively, "plaintiffs") as PRPs who had substantially contributed to the contamination of the Site and thus were liable under CERCLA § 107(a), 42 U.S.C. § 9607(a), for the costs of the cleanup. Unable to reach

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stantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24). A "removal action," by contrast, involves, *inter alia*, "the cleanup or removal of released hazardous substances from the environment" and "the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." *Id.* § 9601(23).

a settlement with them, the EPA, on May 31, 1989, issued an administrative order pursuant to CERCLA § 106, 42 U.S.C. § 9606, commanding plaintiffs to clean up the Site as set forth in the ROD.[4] *In re: Braniff, Inc., et al.*, CERCLA Dkt. No. VI-05-89 (EPA Region 6, Dallas, TX). Plaintiffs agreed to perform the remediation as ordered, and remediation activities began in January 1990. Those activities were completed by August 29, 1991, at a cost of $6.2 million.

Procedural Background

Plaintiffs filed this suit on August 29, 1994, against petitioners and scores of other parties whom they believed contributed to the contamination of the Site. Plaintiffs asserted a self-styled cost recovery claim under CERCLA § 107(a), and a contribution claim under CERCLA § 113(f), in addition to pendent claims under Oklahoma law. Unlike the cost recovery claim, which sought to hold defendants jointly and severally liable for all of the cleanup costs plaintiffs had incurred to date and would incur in the future, the contribution claim merely sought an equitable allocation of those costs among plaintiffs and defendants on a several (as opposed to joint and several) basis. Insofar as relevant here, the district court entered summary judgment against plaintiffs on their cost recovery claim and ruled that the bulk of the costs sought in their contribution claim were time-barred.

In reliance on binding Circuit precedent, the district court ruled that "the only cause of action available to a

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[4] CERCLA § 106 grants the President broad powers to respond to "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility [covered by CERCLA])." 42 U.S.C. § 9606(a). When faced with such a danger, the President may, among other things, "issu[e] such orders as may be necessary to protect public health and welfare and the environment." *Id.* The power to issue such orders (hereinafter referred to as "section 106 orders") has been delegated to the EPA. *See* Exec. Ord. No. 12,580, 52 Fed. Reg. 2,923 (Jan. 23, 1987).

PRP seeking to recover from another PRP for cleanup costs is a § 113(f) contribution action." Pet. App. 20a (citing *United States* v. *Colorado & E. R.R. Co.*, 50 F.3d 1530, 1539 (10th Cir. 1995)). Because plaintiffs "concede[d] that they generated wastes containing hazardous substances that were transported to the Site," they could not bring a cost recovery action against other PRPs under CERCLA § 107. *Id.* Accordingly, the court entered summary judgment against plaintiffs on their cost recovery claim.

The court then turned to the statute of limitations question. The court noted that a triggering event for the three-year contribution statute of limitations under CERCLA § 113(g)(3) was lacking here because plaintiffs conducted their remediation activities in response to a section 106 order, which is "not one of the triggering events listed [in section 9613(g)(3)]."[5] *Id.* at 24a. Given the absence of a triggering event for section 106 orders (which it deemed an "inadvertent omission" in light of Congress' clear intent in SARA to provide a statute of limitations for all CERCLA actions, Pet. App. 25a), the district court ruled that "this Court must supply one, looking to federal common law for guidance." *Id.* Invoking general principles of contribution law, the court concluded that where, as here, none of the statutory triggering events has occurred, a contribution action must be brought within three years of when "the party seeking contribution has paid more than [its] fair share of a common liability." *Id.* at 26a. The court entered judgment accordingly and certified the issue for appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. 40a-42a.

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[5] The three-year statute of limitations under section 9613(g)(3) for contribution actions is triggered by any of the following orders: (1) a judgment in a section 107 cost recovery action, 42 U.S.C. § 9613(g)(3)(A); (2) an "administrative order under § 9622(g) of this title (relating to *de minimis* settlements) or § 9622(h) of this title (relating to cost recovery settlements)," *id.* § 9613(g)(3)(B); or (3) entry of "a judicially approved settlement with respect to [response] costs or damages." *Id.*

DECISION OF THE COURT OF APPEALS

The Tenth Circuit accepted the case (Pet. App. 38a-39a) and affirmed in part and reversed in part. The court of appeals affirmed the district court's ruling with respect to plaintiffs' section 107 cost recovery claim, concluding that, regardless of the label on their pleadings, their claim, as admitted PRPs who contributed to the contamination of the Site, "is still a claim for contribution" that can only be brought under section 113(f). Pet. App. 8a. The appellate court parted company, however, with the district court on the statute of limitations issue.

Even though "PRPs who have contributed waste to a site . . . are limited to seeking contribution from other PRPs" (*id.*) and thus may not bring a cost recovery action, where, as here, no triggering event under the contribution statute of limitations (CERCLA § 113(g)(3)) has occurred, "§ 113(g)(2)"—the statute of limitations for cost recovery actions—"covers PRPs in this situation." *Id.* at 11a. "While a § 113 contribution action is not a 'cost recovery' action under § 107 as that action has been defined, because it does not impose strict, joint and several liability on the defendant PRPs, it *is* an action for recovery of the *costs referred to* in § 107." *Id.* at 10a. This is so because, in the court of appeals' view, it is section 107(a), not section 113(f), that gives rise to a right of contribution: " 'section 107 created the right of contribution, [and] the 'machinery' of § 113 governs and regulates such actions.' " *Id.* at 9a (quoting *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997)). In short, "because no previous action under §§ 106 or 107 has been filed with respect to this site, Plaintiffs' contribution action—while governed by the equitable principles of § 113(f)—is the '*initial action*' for recovery of such costs," and so the court concluded that the six-year limitations period set forth in CERCLA § 113(g)(2)(B) applied. *Id.* at 11a. Consequently, the court reinstated plaintiffs' contribution claims as timely filed.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit cannot have it both ways; a contribution claim under CERCLA either is, or is not, a cost recovery claim. If contribution actions are merely a species of cost recovery actions, then PRPs not only may bring suit under section 107(a)—they *must* do so, for it is that provision that provides their right of action. On the other hand, if contribution actions are not cost recovery actions, the timeliness of a contribution claim is governed solely by the three-year statute of limitations for contribution claims (42 U.S.C. § 9613(g)(3)), as opposed to the longer limitations period that applies to cost recovery actions (*id.* § 9613(g)(2)(B)). Sacrificing consistency for expediency, however, the Tenth Circuit adopted the "Alice in Wonderland"-like view that a contribution claim is a cost recovery claim—but only *sometimes*. Thus, after affirming the dismissal of plaintiffs' section 107 cost recovery claim (because a suit by and between PRPs is necessarily a contribution claim), the court of appeals held that plaintiffs' contribution claims were timely under section 113(g)(2)(B) (because an action for contribution is necessarily a cost recovery action).

This result is not only internally inconsistent; it is inconsistent with the decisions of other Circuits and controlling decisions of this Court. In ruling that the two type of actions are non-distinct and overlapping for statute of limitations purposes, the court below created a conflict with several other Circuits that have ruled that contribution claims are indeed distinct from, and are not a subspecies of, cost recovery actions. Moreover, the court of appeals added to the divergence of opinion that exists in the lower courts over when a contribution action in the absence of a triggering event under CERCLA § 113(g)(3) can be brought. A writ of certiorari should issue to bring badly needed guidance from this Court to this confused area of law and to bring the court below into line with controlling decisions of this Court.

I. THE COURT OF APPEALS' RULING THAT A CONTRIBUTION ACTION IS A COST RECOVERY ACTION DEEPENS A SPLIT OF AUTHORITY ON THE RELATIONSHIP BETWEEN THESE TYPES OF ACTIONS AND THE PROPER LIMITATIONS PERIOD FOR A CONTRIBUTION ACTION FOLLOWING A SECTION 106 ORDER BY THE EPA.

A. The Tenth Circuit Has Deepened A Conflict Among The Circuits On Whether Contribution Actions And Cost Recovery Actions Are Distinct Or Overlapping Remedies, A Question That Controls The Selection Of The Proper Statute Of Limitations In This Context.

1. The Tenth Circuit expressly acknowledged that its ruling that contribution actions are necessarily cost recovery actions, for statute of limitations purposes at least, was contrary to the decision of the Third Circuit in *In re Reading Co.*, 115 F.3d 1111 (1997). Indeed, the court below rejected *Reading* as based on "a misconception of the relationship between §§ 107 and 113." Pet. App. at 14a.

In *Reading*, the Third Circuit ruled that contribution actions and cost recovery actions are distinct, non-overlapping forms of relief. Prior to the SARA amendments to CERCLA, PRPs "could make a viable claim for contribution under § 107(a)(4)(B)" because the courts had recognized an implied right of action for contribution under that provision. 115 F.3d at 1118. With the enactment of CERCLA § 113(f)(1) in 1986, however, Congress "*replace*[*d*] the judicially crafted [contribution] measure with an express statutory remedy." *Id.* at 1119 (emphasis added); see also *id.* at 1120 ("We therefore rely on CERCLA's plain meaning to hold that § 113(f) replaces the judicially created cause of action under § 107(a)(4)(B) to the extent that a party seeks contribution."). As a result, after SARA, CERCLA § 113 (f)(1) is "the *sole* means for seeking contribution—at whatever time in the cleanup process the party, seeking contribution, decides to pursue it." *Id.* (emphasis added).

Were it otherwise, the court noted, "that would throw the proverbial monkey wrench into the works" by permitting plaintiff PRPs to evade section 113's restrictions on contribution actions through the simple expedient of characterizing their contribution claims as cost recovery claims. *Id.*

These rulings are directly contradicted by the decision below. Contrary to the holding in *Reading* that section 113(f)(1) created a new, express statutory right to contribution that *replaces* the pre-SARA implied right to seek contribution under section 107(a)(4)(B), the Tenth Circuit below construed SARA as merely *approving and leaving intact* the pre-SARA implied right of action for contribution under section 107. See, *e.g.*, Pet. App. 9a ("§ 113(f) did not create a new cause of action, nor did it create any new liabilities. 'It is no more than a mechanism for apportioning [CERCLA]-defined costs.' ").[6] The Tenth Circuit has thus reduced the entirety of section 113(f)(1) to the phrase, "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate" (42 U.S.C. § 9613(f)(1)), ignoring the critical passage from the provision that, as the *Reading* court correctly ruled, creates an express right of action for contribution. See *id.* (providing that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title").

Indeed, the Tenth Circuit quite clearly threw into the CERCLA works the "monkey wrench" rejected by the

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[6] The court below quoted a statement from another Third Circuit case, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (1997), to the effect that " '[s]ection 113 does not in itself create new liabilities.' " Pet. App. 9a. That statement was taken out of context. *Halliburton* stressed that section 113 conferred "a clear, *statutory right* to seek [contribution]" from parties themselves jointly and severally liable under section 107(a) (111 F.3d at 1122 (emphasis added)), a conclusion plainly at odds with the Tenth Circuit's view that section 113 "did not create a new cause of action." Pet. App. 9a.

Third Circuit as "undesirable" in light of congressional intent. *Reading*, 115 F.3d at 1119. Contrary to the holding in *Reading* that PRPs should not be allowed to "end run" the statutory restrictions on contribution by characterizing their contribution claims as cost recovery claims (*id.*), the court of appeals here has done precisely that. To be sure, the Tenth Circuit held that all other features of CERCLA § 113(f), such as the settlement bar rule discussed in *Reading* (CERCLA § 113(f)(2)) and the equitable measure of recovery (CERCLA § 113(f)(1)), are controlling even though it decided that the contribution claim is premised upon section 107(a). Pet. App. 14a-15a. Nevertheless, the fact remains that the court below permitted one key feature of a post-SARA contribution action—the statute of limitations—to vary based on whether the action can be conceived of as overlapping with section 107(a).

Even the Tenth Circuit could not dispute the fact that both the text and legislative history of CERCLA § 113(g) demonstrate that Congress intended that *all* contribution actions would be subject to a three-year statute of limitations. The provision is entitled "Contribution Actions" and governs when an "action for contribution for any response costs or damages may be commenced." 42 U.S.C. § 9613(g)(3). These features of the statute leave no doubt that Congress intended that CERCLA § 113 (g)(3), not CERCLA § 113(g)(2), would be controlling on the timeliness of any action for contribution. On this issue the legislative history could not be clearer: "This section [CERCLA § 113] establishes a three-year statute of limitations for the filing of an action for contribution for response costs or damages." H.R. Rep. No. 99-253(I), at 79 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861. Disregarding the legislative judgment that a CERCLA contribution action should be brought within three years of accrual, the Tenth Circuit performed precisely the type of "end run" around CERCLA § 113 properly condemned as illegitimate in *Reading* by applying

the six-year statute of limitations for cost recovery actions to contribution actions following section 106 orders. The two rulings, therefore, stand in unquestioned and acknowledged conflict with one another.

2. The Tenth Circuit's decision also conflicts with precedents from several other Circuits which, like *Reading*, reject the view that a post-SARA action for contribution can be considered a cost recovery action under section 107(a).

The leading decision is *United Technologies Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994). There, the First Circuit considered whether an action by a PRP against other PRPs could be deemed timely under the six-year cost recovery statute of limitations (CERCLA § 113(g)(2)(B)). The First Circuit held that it could not; the Tenth Circuit here, of course, reached the opposite conclusion.

The First Circuit held that the reference to "recovery of costs" in CERCLA § 113(g)(2)(B) requires that the six-year limitations period set forth therein applies only to cost recovery actions for joint and several liability. As the court put it: the phrase "recovery of costs," which is "reiterative of the subsection heading 'Actions for recovery of costs,' suggests full recovery; and it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures." 33 F.3d at 100. The Tenth Circuit in this case rejected that view (namely, "that § 113(g)(2) covers only the traditional 'cost recovery' action under § 107—which imposes strict, joint and several liability"), stating tersely that "the language in question contains no such limitation." Pet. App. 12a. The court below offered no response to the First Circuit's holding that a suit for contribution necessarily is not an action for "recovery" of response costs because such a suit merely seeks to allocate part of their response costs to other PRPs, as opposed to shifting all of those costs to other PRPs.

Similarly, although the court below held that "all actions by and between jointly and severally liable PRPs are 'actions under § 107' for purposes of liability" (Pet. App. 15a), the First Circuit squarely rejected that view, concluding that "cost recovery and contribution actions are distinct and do not overlap." 33 F.3d at 100; see also *id.* at 103 ("CERCLA's text indicates that contribution and cost recovery actions are distinct, non-overlapping anodynes[.]"). Because a contribution action is not a cost recovery action, the First Circuit held that the timeliness of a contribution action is controlled solely by CERCLA § 113(g)(3): "[T]he shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties . . . , while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups (say, the federal, state, or local government)."[7] 33 F.3d at 99. Again, the Tenth Circuit concluded here that the longer statute of limitations, which *United Technologies* held inapplicable to actions by and between PRPs, can and does apply to such suits absent a triggering event under CERCLA § 113(g)(3). Pet. App. 12a.

The Fifth and Eleventh Circuits agree with *Reading* and *United Technologies*, and disagree with the court of appeals below, on the question of whether cost recovery and contribution actions are overlapping or distinct remedies. See *OHM Remediation Servs.* v. *Evans Cooperage Co.*, 116 F.3d 1574, 1582 (5th Cir. 1997) (holding

[7] The court left open the "possib[ility]" that "a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607[(a)]" and did not decide what statute of limitations would apply to such an action. *United Techs.*, 33 F.3d at 99 n.8. This case does not present that question because it was only significant "governmental prodding," in the form of a section 106 order by the EPA, that prompted plaintiffs to initiate a cleanup at the Site. As such, to quote the district court, their remediation "can hardly be characterized as voluntary." Pet. App. 25a n.6.

that "§ 113(f) was not meant to be duplicative of section 107(a), but meant instead to allow potentially responsible parties a cause of action to mitigate the harsh effects of joint and several liability"); *Redwing Carriers*, 94 F.3d at 1513 (11th Cir. 1996) ("[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f).").

3. In the face of these adverse precedents from its sister Circuits, the Tenth Circuit's ruling finds support in but one other Circuit—the Ninth. In *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (1997), the Ninth Circuit endorsed the internal contradiction (euphemistically termed a "duality," *id.* at 1301) embraced by the court below, in which a contribution action is not a cost recovery action for purposes of pursuing joint and several liability (*id.* at 1306), but may be a cost recovery action for statute of limitations purposes in the absence of a triggering event under CERCLA § 113 (g)(3). *Id.* at 1305 & n.7 (dicta). The Ninth Circuit stated that "§ 107 implicitly incorporates a claim for contribution" even after passage of SARA (*id.* at 1301) because, in reality, section 113(f) " 'does not create the right of contribution' " enjoyed by PRPs. *Id.* at 1302 (quoting *United States* v. *ASARCO, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993)). As the *Pinal Creek* court would have it, "§ 107 created the right of contribution. [but] the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." [8] *Id.*

In sum, the Tenth Circuit's ruling in this case is consistent only with the Ninth Circuit's language in *Pinal*

[8] The Tenth Circuit below seized upon that reasoning as support for its ruling on the statute of limitations issue (Pet. App. 9a), even though *Pinal Creek* explicitly "decline[d] the [plaintiff's] invitation to opine on [that issue] indirectly," noting that "[n]o statute of limitations issue is before us in this case." 118 F.3d at 1305.

Creek, and is in conflict with decisions of the First, Third, Fifth and Eleventh Circuits. In contrast to the Tenth Circuit, these latter Circuits correctly interpret CERCLA as sharply delineating between actions for contribution (which are governed exclusively by the three-year limitations requirement of CERCLA § 113(g)(3)) and cost recovery actions (which are subject to the six-year limitations period of CERCLA § 113(g)(2)(B)). As shown by the number of times the courts of appeals have been called upon in recent years to clarify the relationship between contribution and cost recovery actions under CERCLA, this issue is important to the proper administration of CERCLA. See, *e.g.*, Pet. App. 3a ("For the third time in as many years, we are faced with the task of further defining and clarifying the relationship between §§ 107 and 113[.]"). This Court should grant certiorari to resolve the decisional conflict over this recurring issue.

B. The Ruling Below Has Created A Three-Way Split Of Authority On The Limitations Period Applicable To Contribution Suits Brought By Liable Parties Who Conduct Cleanups In Response To Section 106 Orders.

Even on the narrow issue of the applicable statute of limitations under CERCLA for a contribution suit for an allocation of costs incurred in compliance with a section 106 order, there is a conflict of authority in the lower courts. Indeed, three different answers to that single question of law have emerged in the lower federal courts. Clearly, this is a situation that calls for review by this Court.

1. The first of the two alternative approaches to the Tenth Circuit's was recently announced by the Seventh Circuit. *Rumpke of Indiana, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235 (1997). In that case, the court of appeals considered the statute of limitations issue in connection with its recognition of an "innocent landowner" exception to the rule uniformly accepted in the Circuits

that PRPs cannot bring suit for joint and several liability under section 107(a). The court rejected a claim that recognition of such an action on behalf of an innocent landowner (defined as a party who, although technically a PRP based on its ownership of a contaminated site, has "contributed nothing to the hazardous conditions" there, *id.* at 1240) would flout the three-year contribution statute of limitations in cases where, as in *Rumpke* itself, no triggering event under CERCLA § 113(g)(2) has occurred. In such cases, the court ruled, "[t]he contribution claim *would not accrue until one of the events specified in § 9613(g)(2)* [*sic*] *occurred,* at which time three years would be available in which to file an appropriate suit." [9] *Id.* at 1241 (emphasis added).

As a result, the Seventh Circuit reads issuance of the court or administrative orders specified in CERCLA § 113(g)(3) as more than simply events that trigger the running of the three-year statute of limitations for contribution actions—they also govern when a contribution claim accrues and thus can be asserted. This reading of the statute produces the sensible result that the statute of limitations begins to run at the same time the cause of action accrues, and also respects Congress' policy judgment that *all* contributions should be brought within three years of accrual. The Tenth Circuit's holding in this case, however, is flatly contrary to *Rumpke* in these respects.

Unlike the Tenth Circuit, the Seventh Circuit denies non-innocent PRPs, such as plaintiffs, a remedy under CERCLA § 113(f)(1) unless a triggering event has occurred, for until that time "[t]he contribution claim would not accrue." [10] *Id.* at 1241. As its ruling reinstat-

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[9] The *Rumpke* court's reference to section 9613(g)(2) was obviously a typographical error, given that it is section 9613(g)(3) that provides the three-year statute of limitations for contribution actions. *Compare* 42 U.S.C. § 9613(g)(2) *with id.* § 9613(g)(3).

[10] Of course, PRPs have control over whether the triggering events occur, in that they can reach a judicially approved settlement

ing plaintiffs' contribution claims demonstrates, the Tenth Circuit, by contrast, holds that a claim for contribution *does* accrue (and can be brought and recovered upon) even if, as here, a triggering event *never* occurs. On this issue, therefore, there is a square conflict between the Seventh and Tenth Circuits.

2. The second approach to the problem of determining the applicable limitations period for a contribution claim in the absence of one of the triggering events specified in CERCLA § 113(g)(3) has been endorsed by several lower courts. See, *e.g.*, *Gould Inc.* v. *A&M Battery and Tire Serv.*, 901 F. Supp. 906 (M.D. Pa. 1995); *Reichhold Chems., Inc.* v. *Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995). Surprisingly, given this Court's long-standing recognition that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws' " (*Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams* v. *Woods*, 2 Cranch 336, 342 (1805)), these decisions ruled that there is *no statute of limitations at all* for contribution claims as to which no triggering event has occurred, including claims for costs incurred in response to section 106 orders. See *Gould*, 901 F. Supp. at 915 ("As none of the so called triggering events have occurred, Gould's claim, which is one for contribution, is timely brought."); *Reichhold*, 888 F. Supp. at 1125 (holding that absent a court or administrative ruling that "meet[s] the statutory criteria of Section 113(g)(3)," a contribution claim "is not time barred").

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with the EPA, thereby causing their inchoate right to contribution under CERCLA § 113(f)(1) to mature. *See* 42 U.S.C. § 9613(g)(3). Where a PRP intends to comply with a section 106 order—and parties confronted with such orders generally do comply given, *inter alia*, the draconian monetary fines that attend noncompliance (*see id.* § 9606(b))—the PRP is going to perform the cleanup, as directed in the EPA's order and ROD. Accordingly, there are good reasons for the PRP to resolve any questions about its conduct and liability in a settlement agreement, a result that would give affected parties notice and an opportunity to be heard and would trigger the statutory procedural protections for CERCLA settlements. *See id.* § 9622(i).

The Tenth Circuit explicitly rejected these courts' "exclusive reliance upon § 113(g)(3)" in the absence of a triggering event (Pet. App. 12a n.3) and looked to CERCLA § 113(g)(2)(B) for the applicable limitations period in that circumstance. The Seventh Circuit in *Rumpke*, however, sided with the district courts in this respect, holding that section 113(g)(3) alone provides the applicable statute of limitations for contribution claims. 107 F.3d at 1241. Nonetheless, *Rumpke* reached a result at odds with the Tenth Circuit and the district courts in concluding that a contribution action "[can]not accrue until one of the events specified in § 9613(g)[(3)] occur[s]." *Id.*

In further conflict with the Tenth Circuit, *Gould* and *Reichhold* reject the view that section 9613(g)(2) provides the statute of limitations for contribution actions bereft of one of the statutorily prescribed triggering events—a view likewise rejected by the First Circuit in *United Technologies*, 33 F.3d at 99 (ruling that "the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups," not PRPs). See *Gould*, 901 F. Supp. at 914 ("Plaintiff Gould's assertion that § 113(g)(2) is the applicable statute of limitations is incorrect, since that section relates to cost recovery actions under § 107, while the instant case is a contribution action under § 113."); *Reichhold*, 888 F. Supp. at 1125 (holding that it "is not necessary, or even proper," to look to section 113(g)(2) or any statute of limitations other than "the limitations period mandated by Congress" for contribution actions, CERCLA § 113(g)(3)).

As this discussion of the extant caselaw makes clear, this area of law is rife with confusion and disagreement among the lower courts on the proper relationship between cost recovery and contribution actions as it relates to selection of the proper statute of limitations in cases where no triggering event under CERCLA § 113(g)(3) has occurred. This is an important issue, for on it

hinges whether PRPs not targeted by the EPA will be granted the full measure of protection against stale claims that Congress intended to confer in the SARA amendments. See H.R. Rep. No. 99-253(I), at 273 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 28621 (explaining that statutes of limitations were added in SARA "to assure that evidence concerning liability and response costs is fresh and to provide a measure of finality to affected responsible parties"). When four courts split three different ways on an important question of law, as they have here, it becomes plain that the conflict will not abate absent authoritative guidance from this Court. Accordingly, the Court should grant certiorari in this case to provide that needed guidance.

II. THE TENTH CIRCUIT'S DECISION EXTENDING THE COST RECOVERY STATUTE OF LIMITATIONS TO CONTRIBUTION ACTIONS FOLLOWING SECTION 106 ORDERS CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT.

The Tenth Circuit's ruling below is contrary to controlling decisions of this Court. This provides another reason to grant certiorari in this case.

A. The Tenth Circuit Has Resurrected The Pre-SARA Federal Common Law Right To Contribution Under CERCLA Even Though The SARA Amendments To CERCLA Explicitly Address—And Thus, Under This Court's Precedents, Displace—That Aspect Of Federal Common Law.

As originally enacted, CERCLA did not provide an express right of action for contribution. Based on concerns about the inequity of holding each PRP jointly and severally liable for the costs of an entire cleanup, however minor its contribution to the contamination may have been, the lower federal courts almost without exception responded by "finding an implicit, federal common law right to contribution." *OHM Remediation Servs.* v. *Evans Cooperage Co.*, 116 F.3d 1574, 1581 (5th Cir. 1997); see generally *Mardan Corp.* v. *C.G.C. Music, Ltd.*, 804 F.2d 1454,

1457 n.3 (9th Cir. 1986) (citing cases). The legal landscape changed considerably in 1986. As this Court explained in *Key Tronic Corp.* v. *United States,* 511 U.S. 809 (1994), "[t]he 1986 [SARA] amendments included a provision—CERCLA § 113(f)—that expressly created a cause of action for contribution." *Id.* at 816. In light of the availability of an express statutory right of action under SARA for contribution, the question arises whether it is appropriate for federal courts to preserve the pre-SARA judicially implied right of action for contribution under section 107(a)(4)(B).

Breaking ranks with other Circuits, see, *e.g., In re Reading Co.,* 115 F.3d 1111, 1118-19 (3d Cir. 1997), the Tenth Circuit below ruled that the federal common law right to contribution survived enactment of SARA. The court reasoned that, by virtue of the pre-SARA federal common law implied right of action for contribution under section 107(a)(4)(B), "all" actions for contribution "are 'actions under § 107' for purposes of liability" (Pet. App. 15a), with section 113(f) providing "no more than a mechanism for apportioning [CERCLA]-defined costs." Pet. App. 9a (internal quotation marks omitted). In effect, the court of appeals held that the provision of section 113(f)(1) that, to quote this Court, "*expressly created* a cause of action for contribution" (*Key Tronic,* 511 U.S. at 816 (emphasis added)) had to give way to the prior federal common law implied right of action for contribution. That holding cannot be reconciled with controlling decisions of this Court.

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee* v. *Illinois,* 451 U.S. 304, 312 (1981). Rather, "federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law." *Id.* at 319 n.14. It is in this sense that, as this Court has repeatedly declared, " '[t]here is no federal general com-

mon law.' " *O'Melveney & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994) (quoting *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938)).

In light of these well-established principles, it is plainly the federal common law rule—*not*, as the Tenth Circuit would have it, the statute—that must yield when Congress legislates in an area formerly governed by federal common law. As the Court ruled in *City of Milwaukee*, whenever federal courts announce a rule of federal common law, their handiwork, of necessity, "is 'subject to the paramount authority of Congress.' " 451 U.S. at 313 (quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931)). As a result, "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* The Court reaffirmed congressional supremacy over federal common law in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981):

> [O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law.

Id. at 95 n.34.

As applied to this case, these precedents from this Court leave no doubt that the Tenth Circuit overstepped the bounds of its authority in preserving the pre-SARA federal common law implied right to contribution under CERCLA in the face of the express right of contribution conferred by SARA. In terms that could hardly be clearer, Congress, in 1986, directly addressed itself to the question whether there is a right to contribution among parties who are jointly and severally liable under CERCLA. In doing so, it did more than merely "confirm" the implied right of action previously recognized by the lower federal courts; it

conferred an express right of action for contribution, CERCLA § 113(f)(1). See *Key Tronic*, 511 U.S. at 816; see generally *New Castle County* v. *Halliburton NUS Corp.*, 903 F. Supp. 771, 778 (D. Del. 1995) (holding that instead of merely "clarifying that § 107 had always been intended to be available to PRPs," SARA "guaranteed a PRP's right to contribution via creation of a new statutory section, § 113(f)(1)"), *aff'd*, 111 F.3d 1116 (3d Cir. 1997).[11] Because SARA thus directly addresses the existence of a right to contribution under CERCLA, there is no "justification" for adhering to the pre-SARA federal common law implied right of action for contribution under section 107(a). *Northwest Airlines*, 451 U.S. at 95, n.34; see also *City of Milwaukee*, 451 U.S. at 313.

Accordingly, controlling decisions from this Court dictate a conclusion opposite to that reached below— namely, the rights of PRPs to contribution are based upon, and are controlled solely by, CERCLA § 113(f), *not* the preexisting rule of federal common law right of action for contribution implied under CERCLA § 107(a)(4)(B). Even apart from the confusion among the lower court decisions on the proper relationship between cost recovery and contribution actions, this Court should grant certiorari to correct the court of appeals' intrusion on the

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[11] Although *Key Tronic* cryptically stated that CERCLA §§ 107(a) and 113(f) are "similar and somewhat overlapping" (511 U.S. at 816), that dictum (on which the Tenth Circuit relied, Pet. App. 13a) is inapposite here. *See United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d at 103 n.12 ("The *Key Tronic* Court was discussing two different species of contribution actions and expressed no views anent the relation between contribution and cost recovery actions."); *see also In re Reading*, 115 F.3d at 1120 (comment referred only to the unquestioned ability of innocent landowner PRPs to recover under either CERCLA provision). The statement assuredly does not support the court of appeals' sweeping conclusion that "*all* [contribution actions under § 113(f)] are 'actions under § 107.'" Pet. App. 15a (emphasis added). The dispute between the court below and these other Circuits on the proper interpretation of *Key Tronic* provides a further reason for granting certiorari here.

legislative domain, thereby giving full effect to the SARA amendments to CERCLA.

B. Because CERCLA Fails To Specify A Triggering Event For The Three-Year Limitations Period Congress Enacted For All Contribution Actions, This Court's Precedents Required The Court Below To Borrow The Most Closely Analogous Limitations Period From State Law.

The Tenth Circuit reached a result contrary to this Court's precedents in another respect as well. When faced with the absence of an applicable triggering event to commence the running of the three-year statute of limitations for contribution actions under CERCLA § 113(g)(3), the court below shoe-horned such contribution actions into the six-year cost recovery statute of limitations (CERCLA § 113(g)(2)(B)). To the extent a contribution action can even accrue in the first place absent one of the statutorily defined triggering events—a possibility another Circuit has rejected, see *Rumpke of Indiana, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997)—the court of appeals' result is contrary to established law from this Court.

In the not uncommon situation where Congress creates a federal cause of action without enacting a corresponding statute of limitations, this Court's precedents have provided a ready answer for more than 150 years. "Since 1830, 'state statutes have repeatedly supplied the periods of limitations for federal causes of action' when the federal legislation made no provision[.]" *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (quoting *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966)); see also, *e.g.*, *Wilson* v. *Garcia*, 471 U.S. 261, 266-67 & n.12 (1985) (citing cases); *Reed* v. *United Transp. Union*, 488 U.S. 319, 323-24 (1989). As this Court held in *Wilson*, "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law," except in the rare circumstance where there is a significant conflict between federal

law and the use of state law. 471 U.S. at 266-67. Because this practice of borrowing state statutes of limitations is "longstanding," it is "not only appropriate but also realistic to presume" that, in enacting a cause of action without specifying a federal limitations period, Congress intends that state statutes of limitations be borrowed.[12] *North Star Steel,* 515 U.S. at 34 (internal quotation marks omitted).

Another line of precedents dictates the use of state law in this case to fill any gap in CERCLA on the statute of limitations question. These cases all proceed from the recognition that, in legislating, "Congress acts against the background of the total *corpus juris* of the states." *Atherton* v. *FDIC,* 117 S. Ct. 666, 670 (1997) (internal quotation marks and ellipses omitted). In light of this fact, this Court has held that there is a strong presumption in favor of using state law to fill gaps or interstices in comprehensive federal statutory schemes. Under *O'Melveney & Myers* v. *FDIC,* questions left unaddressed in such schemes are "presumably left subject to the disposition provided by state law." 512 U.S. at 85 (citing *City of Milwaukee,* 451 U.S. at 319; *Northwest Airlines,* 451 U.S. at 97). As this Court has recognized, and as even cursory perusal of the statute confirms, "CERCLA is a comprehensive statute." *Key Tronic,* 511 U.S. at 814; see also *Reading,* 115 F.3d at 1119 (same as to SARA amendments). As such, there can be no doubt that state law should be utilized in filling the interstices in CERCLA. See, *e.g., Redwing Carriers,* 94 F.3d at 1498-1502 (adopting state partnership law); *Anspec Co.* v. *Johnson Controls, Inc.,* 922 F.2d 1240, 1248 (6th Cir. 1991) (adopting state corporate law).

Under both lines of precedents, the proper course for the court below was to borrow the analogous statute of

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[12] Of course, federal, rather than state, statutes of limitations are to be borrowed where federal law "provides a closer analogy" to the cause of action in question. *North Star Steel,* 515 U.S. at 35 (citing cases) (internal quotation marks omitted).

limitations from the relevant State (here, Oklahoma). Had the court followed this rule, it would have discovered that Oklahoma provides a general three-year statute of limitations—the *same* time period adopted in CERCLA § 113(f)(1) for contribution actions—for "action[s] upon a liability created by statute other than a forfeiture or penalty." Okla. Stat. tit. 12, § 832. As the district court held (and as all parties "agree[d]," Pet. App. 27a) with respect to plaintiffs' pendent state law claims for contribution, the Oklahoma limitations period for contribution actions is triggered when a liable party has paid more than its fair share of a common liability. *Id.* 26a-27a. This clear, readily available limitations period should have been applied under this Court's precedents.[13] The Tenth Circuit's departure from these age-old principles provides a further reason for this Court to grant review in this case.

* * * *

In sum, this Court's guidance is sorely needed to bring clarity to this confused area of federal law. Without agreement on basic questions such as those presented in this Petition, which are fundamental to the proper administration of CERCLA, parties faced with the prospect of CERCLA liability will be uncertain about their rights. Moreover, the parties and the courts will continue to be mired in drawn-out litigation in CERCLA cases over these collateral (but nonetheless important) matters, instead of the central issues of determining and apportioning liability for the costs of cleaning up hazardous waste sites.

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[13] The fact that the bulk of plaintiffs' contribution claims would be untimely under Oklahoma law (Pet. App. 27a-28a) does not suggest that adoption of state law would be inconsistent with CERCLA. State law "cannot be considered 'inconsistent' with federal law merely because [it] causes the plaintiff to lose the litigation." *Robertson* v. *Wegmann*, 436 U.S. 584, 593 (1978).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 12, 1997

APPENDICES

APPENDIX A

[Filed Aug. 14, 1992]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-5222

SUN COMPANY, INC. (R&M),
a Delaware corporation;
TEXACO, INC.,
a Delaware corporation,
Plaintiffs-Appellants,

v.

BROWNING-FERRIS, INC., a Delaware corporation; ARK WRECKING COMPANY OF OKLAHOMA, INC., HOUSING AUTHORITY FOR THE CITY OF TULSA; PEDRICK LABS; JOHN DOE d/b/a Pedrick Labs; ART WEEDIN; BEVERAGE PRODUCTS CORP.; COWEN CONSTRUCTION, INC.; NATIONAL TANK CO.; PEEVY CONSTRUCTION CO. INC.; MONTE SHIPLEY; SUN CHEMICAL CORPORATION; OZARK MAHONING COMPANY; THE CITY OF SAND SPRINGS, OKLAHOMA; ATLANTIC RICHFIELD COMPANY; PUBLIC SERVICE COMPANY OF OKLAHOMA; BANCOFF OIL COMPANY; BORG INDUSTRIAL GROUP., d/b/a American Container Services; CONSOLIDATED CLEANING SERVICES CO. INC.; CHARLES FORHAN, d/b/a D&W Exterminating; OIL CAPITAL-TRASH SERVICES, INC.; STEVE RICHEY, d/b/a Richey Refuse Service; ESTATE OF JOHN D. SHIPLEY, deceased; SHIPLEY REFUSE; ROBERT E. SPARKS, d/b/a Tulsa Industrial Services; UNION CARBIDE CORP.; WASTE MANAGEMENT OF OKLAHOMA, INC.,
Defendants-Appellees,

and

BANK IV OKLAHOMA, N.A.; STAN DOYLE; FLEMINGS ROOFING AND SHEET METAL COMPANY; GRANT GILL, d/b/a Gill Sanitation; INSULATION SERVICES, INC.; WRG CONSTRUCTION COMPANY, INC.; W.R. GRIMSHAW, d/b/a WRG Construction; TULSA COUNTY PUBLIC FACILITIES AUTHORITY; JAMES P. EVATT; F&G EXCAVATION; JOHN DOE, d/b/a F&G Excavation; NELLIE FARRIS; FIRST TOWER CONSTRUCTION; JOHN DOE, d/b/a First Tower Construction; MARVIN R. HALL; SM ROOF; JOHN DOE, d/b/a SM Roof; ESTATE OF ROSS SCOGGINS, SR., deceased; TANDY INDUSTRIES, INC.; W & D BUILDING; JOHN DOE, d/b/a W & D Building; WADE TRASH; JOHN DOE, d/b/a Wade Trash; COMPASS INDUSTRIES, INC.; ESTATE OF JACK DYER, deceased; ROY L. FARRIS; NOLAND CONSTRUCTION CO.; JOHN DOE, d/b/a Noland Construction Co.; MANNON TRUCKING; JOHN DOE, d/b/a Mannon Trucking; MOBILE WASTE CONTROLS; JOHN DOE, d/b/a Mobile Waste Controls; TULSA TANK CLEANING; JOHN DOE, d/b/a Tulsa Tank Cleaning; APARTMENT CONTAINER SERVICE, INC.; CARNES BROTHERS CONSTRUCTION COMPANY; CRAIN DISPLAYS & EXHIBITS, INC.; DOW CHEMICAL COMPANY, d/b/a Dow Industrial Service; EMPIRE ROOFING & INSULATION COMPANY; TOM FARRIS, d/b/a Gene's Septic Tank Service; ODEAN GARRISON; LANGSTON CONTRACTORS, INC.; PETROLEUM CONTRACTORS CORPORATION; VACUUM AND PRESSURE TANK TRUCK SERVICES, INC.; GLENN E. WYNN, JR.; ANCHOR PAINT MFG. CO.; AMRON, INC.; TULSA CONSTRUCTION & MANAGEMENT, INC.; PET CARE CEMETARY; JOHN DOE, d/b/a Pet Care Cemetary; J. B. STALLINGS, d/b/a Stalling Construction Company; BRIERLY PLUMBING TECHNOLOGIES; ROTO-ROOTER SEWER SERVICE; O.K. TANK TRUCKS, INC.; AMERICAN SEPTIC TANK; JOHN W. DIFFEE, deceased, d/b/a Diffee Trash Services; WALTER C. DEPPE, deceased; AMERON, INC., a Caifornia Corporation,

Defendants.

Appeal from the United States District Court
for the Northern District of Oklahoma

(D.C. No. CIV-94-820-K)

Before KELLY, McWILLIAMS, and HENRY, Circuit Judges.

KELLY, Circuit Judge.

For the third time in as many years, we are faced with the task of further defining and clarifying the relationship between §§ 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9607 and 9313. *See United States v. Colorado & Eastern R.R.*, 50 F.3d 1530 (10th Cir. 1995); *Bancamerica Commercial Corp. v. Mosher Steel of Kansas*, 100 F.3d 792 (10th Cir.), *as amended*, 103 F.3d 80 (1996). Plaintiffs Sun Company and Texaco brought this action under both §§ 107 and 113 for costs expended in cleaning up a hazardous waste site. The district court granted partial summary judgment in favor of Defendants. The court held that as a matter of law Plaintiffs were not permitted to bring a cause of action under § 107, and that the limitations period for Plaintiffs' contribution claims under § 113 began running on the date they paid more than their fair share of the remediation costs. With this as the accrual date, the bulk of Plaintiffs' contribution claims were time-barred. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse in part.

Background

The operative facts are not in dispute. An abandoned limestone quarry on the south bank of the Arkansas River in Tulsa County, Oklahoma was operated as a landfill from 1972 to 1976. During this time, hazardous mate-

rials were brought to the site, and eventually began to seep into the soil, surface water, and ground water near the site. In September 1984, the EPA placed the site on the National Priority List. 40 C.F.R. Part 300, App. B. Three years later the EPA issued a Record of Decision, which selected a remediation for the site consistent with the National Contingency Plan. 42 U.S.C. § 9605.

The EPA identified Plaintiffs, as well as several other parties, as Potentially Responsible Parties (PRPs) who had contributed to the waste at the site. After attempts to negotiate a consent decree were unsuccessful, the EPA issued a Unilateral Administrative Order, pursuant to § 106 of CERCLA, compelling Plaintiffs to pay the costs of remediation for the site. 42 U.S.C. § 9606. Plaintiffs agreed to perform the remediation in compliance with the administrative order and the Record of Decision. Remediation activities began in January 1990, and were completed on or by August 29, 1991. Plaintiffs incurred $6.2 million in cleanup costs.

Plaintiffs were able to identify other parties which they believed had also contributed hazardous wastes to the site, and brought this action against them on August 29, 1994, asserting a cost recovery action under CERCLA § 107 and a contribution action under CERCLA § 113. The district court granted Defendants' motion for summary judgment on the § 107 action, holding that PRP's such as Plaintiffs were not allowed to bring a cost recovery action under § 107. Citing *Colorado & Eastern,* 50 F.3d at 1536, the court held that regardless of the label used, the action was for an equitable apportionment of costs between PRPs and was thus a contribution action under § 113.

The limitations period for a contribution claim under § 113(g)(3) is three years. At issue is when the limita-

tions period begins to run. Section 113(g)(3) provides as follows:

> No action for contribution for any response costs or damages may be commenced more than three years after—
>
> > (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
> >
> > (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). Plaintiffs incurred cleanup costs in response to an EPA unilateral administrative order under § 106, which is not one of the triggering events above.

The district court held that the fact that Plaintiffs' action was not governed by one of these triggering events did not guarantee them an unlimited time in which to bring their suit. Rather, according to the district court, this anomaly was the result of an inadvertent omission on the part of Congress. Thus, the court turned to another area of federal contribution law, and held that Plaintiffs' cause of action accrued (and the limitations period began) when they had paid more than their equitable share of the cleanup costs. With this as the accrual date, the bulk of Plaintiffs' claims for contribution were time-barred. The district court ruled that each payment should be treated separately, however, so to the extent Plaintiffs could show they made payments within three years of their filing of the instant action, they would still be entitled to seek contribution.

The district court also noted the uncertainty as to possible future costs, as the EPA's remediation order provides

for thirty years of maintenance and review of the Site. Thus, it declined to rule on Plaintiffs' declaratory action regarding apportionment of such future costs, and requested further briefing on the issue. Such briefing has been abated pending the outcome of this appeal.

Discussion

We review the grant of a motion for summary judgment de novo, applying the same standard as the district court pursuant to Fed. R. Civ. P. 56(c). *Watts v. Atlantic Richfield Co.*, 115 F.3d 785, 790 (10th Cir. 1997). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c). "If there is no genuine issue of material fact in dispute, we must determine whether the substantive law was correctly applied by the district court." *Id.* (quoting *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1229 (10th Cir. 1996). We review de novo the district court's construction of the relevant statutory provisions. *United States v. Wicklund*, 114 F.3d 151, 153 (10th Cir. 1997).

I.

In *Colorado & Eastern*, we attempted to clarify the relationship between cost recovery actions under § 107 and contribution actions under § 113, specifically addressing who can recover under each provision. 50 F.3d at 1534-36. The original CERCLA legislation created only the cost recovery mechanism of § 107, which makes certain enumerated parties (PRPs) "liable for (A) all costs of removal or remedial action incurred by [government entities] . . . , [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. §§ 9607(a)(4)(A) and (B). PRPs' liability in cost recovery actions under § 107 is strict, joint and several. *Colorado & Eastern*, 50 F.3d at 1535 (citing *Farmland Indus. v. Morrison-Quirk Grain*, 987 F.2d

1335, 1339 (8th Cir. 1993); *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1515 (10th Cir. 1991)). Defendants in § 107 actions could only escape joint and several liability —and have cleanup costs apportioned between themselves and other PRPs—if they could demonstrate that the harm was divisible. This was usually impossible given the nature of hazardous waste sites where wastes of varying degrees of toxicity and migratory potential are mixed. Thus, CERCLA, as originally enacted, left a PRP who was singled out as a defendant in a cost recovery action without any means of apportioning costs to other PRPs who may have contributed much of the waste. *Colorado & Eastern*, 50 F.3d at 1535. The courts generally responded to this inequity by recognizing an implicit federal right to contribution where PRPs who were subject to joint and several liability incurred response costs in excess of their pro rata share. *Id.*

Congress codified this implicit right to contribution with the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA), which added § 113(f) (contribution) and (g) (limitations periods) to CERCLA's scheme. We held that under this combined statutory scheme, any action by a PRP who was a defendant in a cost recovery action was a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make," and was "the quintessential claim for contribution." *Id.* at 1536. We reaffirmed this holding in *Bancamerica Commercial*, 100 F.3d at 800.

Plaintiffs argue that *Colorado & Eastern* is distinguishable. They claim that the *Colorado & Eastern* rule is limited to those situations when the plaintiff PRP has incurred cleanup costs pursuant to a civil action under §§ 106 or 107, whereas Plaintiffs in this case incurred cleanup costs without any such action. Thus, they argue, they are not limited to a § 113 contribution claim, but

may also assert a cost recovery claim under § 107. We are not persuaded.

The fact that Plaintiffs incurred cleanup costs by complying with a unilateral administrative order, without forcing the government to take them to court, does not change their status as jointly and severally liable parties. They concede that they generated wastes containing hazardous substances that were transported to the Site. Thus, Plaintiffs' claim is still by and between jointly and severally liable parties, seeking the equitable apportionment of a payment which Plaintiffs have been compelled to make, and is still a claim for contribution. *Bancamerica Commercial,* 100 F.3d at 800; *Colorado & Eastern,* 50 F.3d at 1536.

II.

Plaintiffs' attempted distinction of *Colorado & Eastern* is not, however, without some merit. PRPs who have contributed waste to a site are jointly and severally liable for cleanup costs, and are limited to seeking contribution from other PRPs.[1] If those PRPs have never been defendants in a civil action under §§ 106 or 107, however, it appears that there is no statute of limitations governing their contribution claims. Section 113(g)(3) establishes a three year limitations period for contribution actions, but none of the triggering events listed in that section will occur unless the PRP incurs its cleanup costs pursuant to a § 106 or § 107 civil action brought by the government. *See Pinal Creek Group v. Newmont Mining Corp.*, 1997 WL 362462, at *7 (9th Cir. July 2, 1997). Thus, PRPs

[1] We express no opinion on whether PRPs who assert their *innocence* with regard to any waste at a site may be able to recover all of their costs from other PRPs in an action under § 107. *See Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Technologies v. Browning-Ferris Corp.*, 33 F.3d 96, 99-100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

who, like Plaintiffs here, incur cleanup costs pursuant to a unilateral administrative order (or by a consent decree, or in some cases, voluntarily) potentially have an unlimited time in which to bring their contribution claims. The district court reasoned that this anomaly was the result of an inadvertent gap in the statute, and imported a triggering event from another area of federal contribution law. Plaintiffs argue that this was unnecessary. We agree.

As we made clear in *Bancamerica Commercial*, § 113(f) did not create a new cause of action, nor did it create any new liabilities.[2] 100 F.3d at 800. "It is no more than a 'mechanism for apportioning [CERCLA]-defined costs.' " *Id.* (quoting *County Line*, 933 F.2d at 1517). "Thus, of necessity it must incorporate the liabilities set forth in § 107(a), as those are the costs to be equitably apportioned." *Id. See Pinal Creek*, 1997 WL 362462, at *3 ("§ 107 created the right of contribution, [and] the 'machinery' of § 113 governs and regulates such actions"); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3rd Cir. 1997) ("[S]ection 113 does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs].").

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[2] Section 113(f) of CERCLA governs contribution claims and provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

It is thus clear that "because § 113(f) incorporates the liability provisions of § 107, . . . a § 113(f) action for contribution *is* an action under § 107." *Bancamerica Commercial,* 100 F.3d at 801 (emphasis in original). While a § 113 contribution action is not a "cost recovery" action under § 107 as that action has been defined, because it does not impose strict, joint and several liability on the defendant PRPs, it *is* an action for recovery of the *costs referred to* in § 107. Under CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107, but is governed by the equitable apportionment principles established in § 113(f). *See Pinal Creek,* 1997 WL 362462, at *9 ("Because a claim asserted by a PRP under § 107 requires the application of § 113, a PRP is limited to a contribution claim governed by the joint operation of §§ 107 and 113.").

The contours of all CERCLA claims by and between PRPs who contributed waste to a site are thus governed by the equitable contribution principles of § 113(f), and seek to recover costs referred to in § 107. A close reading of § 113(g) makes it clear, however, that not all contribution claims have the same statute of limitations.

PRPs against whom the government has brought a civil action under §§ 106 or 107 and who incur cleanup costs will do so in one of two ways: either the suit will proceed to judgment or the parties will enter into a settlement. PRPs in either situation are expressly covered by the language of § 113(f): "A person may seek contribution . . . during or following any civil action under [§§ 106 or 107] of this title." In addition, whether by judgment or settlement, the three year limitations period of § 113(g)(3) will be triggered. If the suit proceeds to conclusion, the limitations period begins running on the date of judgment. 42 U.S.C. § 9613(g)(3)(A). If the parties settle, the limitations period begins running on the date of the ad-

ministrative order embodying the settlement (for § 9622(g) de minimis settlements or § 9622(h) cost recovery settlements), or on the date of entry of a judicially approved settlement. 42 U.S.C. § 9613(g)(3)(B). A judgment has its own procedural safeguards, and CERCLA settlements are subject to publication in the Federal Register and a 30-day notice and comment period. 42 U.S.C. § 9622(i).

PRPs who have incurred cleanup costs in some other way are also covered by the language of § 113(f): "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107] of this title." Such PRPs, however, will not trigger the running of the limitations period in § 113(g)(3), nor will their liability be fixed with the procedural safeguards attendant to a civil action.

Contrary to the district court's ruling, however, this does not create a gap in the statute of limitations, because § 113(g)(2) covers PRPs in this situation. It provides:

> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—
>
> . . . .
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . .

42 U.S.C. § 9613(g)(2). As we previously noted, "a § 113(f) action for contribution *is* an action under § 107." *Bancamerica Commercial*, 100 F.3d at 801 (emphasis in original). It is, by definition, an action for recovery of the *costs referred to* in § 107. In this case, because no previous action under §§ 106 or 107 has been filed with respect to this site, Plaintiffs contribution action—while governed by the equitable principles of § 113(f)—is the "*initial action*" for recovery of such costs. Thus, Plaintiffs

§ 113(f) contribution action is the "initial action for recovery of the costs referred to in section 9607 of this title," and must be commenced "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B).

Defendants argue that § 113(g)(2) covers only the traditional "cost recovery" action under § 107—which imposes strict, joint and several liability on other PRPs and which, as we have already held, is not available to Plaintiffs. We disagree because the language in question contains no such limitation. By its own terms, § 113(g)(2) covers the "initial action" for the recovery of "costs referred to" in § 107. There is no question that this language covers a traditional § 107 cost recovery action brought by the government or any other person who is not a waste-contributing PRP. Nothing in that language, however, excludes a contribution action, which also seeks to recover an equitable portion of "costs referred to" in § 107, provided that particular contribution action is the "initial action" to recover such costs.

Defendants also argue that the language of § 113(g)(3) makes it clear that Congress expressly chose a three-year limitations period for all contribution claims. Thus, they argue, the six-year limitations period in § 113(g)(2) cannot apply.[3] It is true that § 113(g)(3) is subtitled "*Contribution*," and provides that "[n]o action for contribution for any response costs or damages may be commenced more than 3 years after—[the four enumerated triggering events]." Contrary to Defendants' arguments, however, our construction of the statute is not inconsistent with this language. A contribution claim which is the "initial action," and thus governed by the six-year limita-

[3] This rationale also was expressed in *Ekotek Site PRP Committee v. Self*, 881 F. Supp. 1516, 1522 n.2 (D. Utah 1995), but we do not find exclusive reliance upon § 113(g)(3), *see Ekotek*, 881 F. Supp. at 1522-23, persuasive in these circumstances.

tions period of § 113(g)(2), will not be commenced more than three years after any of the four enumerated triggering events, because none of those triggering events will ever occur.

By contrast, if a contribution action is *not* the initial action, then by definition a previous action will have been filed, and one of the four triggering events in § 113(g)(3) will occur. In this way, Congress has provided an express statute of limitations to cover all CERCLA contribution actions, regardless of how the PRPs in question incurred their cleanup costs. In effect, there are two different types of contribution actions under CERCLA, each governed by the same equitable rules of § 113(f) and each seeking to equitably apportion costs referred to in § 107, but governed by different statutes of limitations. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (recognizing two "similar and somewhat overlapping" contribution actions under §§ 107 and 113).

This construction of CERCLA is internally consistent in its application of the language of the statute, and follows our precedents and the increasing body of law from other circuits. Together, §§ 107 and 113 allow "any person" who has incurred cleanup costs consistent with the National Contingency Plan to recover some or all of those costs from PRPs who were responsible for the waste. A government entity (Federal, State or Indian) or a party who did not contribute to the waste may recover all of its expenditures in a traditional § 107(a) "cost recovery" action against any PRP. Liability will be strict, joint and several. A PRP who contributed to the waste may recover from other PRPs a portion of the costs it expended in cleaning up the site in a contribution action under § 113(f). *Colorado & Eastern*, 50 F.3d at 1536. The liability of the other PRPs will be defined by § 107, but under § 113(f), that liability will be several, and the total cleanup costs—including responsibility for "orphan

shares"[4]—will be equitably apportioned among all the PRPs, with the court being able to consider any factors it deems relevant. *Id.* If the PRP incurred its cleanup costs pursuant to a civil action under §§ 106 or 107, it will have three years from the date of judgment or settlement in which to bring its contribution claim. 42 U.S.C. § 9613(g)(3). If the PRP incurred its cleanup costs in some other way, without the attendant procedural safeguards of a judgment or CERCLA settlement, its contribution action will be the initial action for recovery of such costs. That PRP will have six years from the start of remediation (or three years after completion of a removal action) in which to file. 42 U.S.C. § 9613(g)(2).

This construction of §§ 107 and 113 also gives effect to each section of the statute. *See Colorado & Eastern*, 50 F.3d at 1536 (rejecting a construction of the statute that would render any part of § 113 meaningless). For example, the Third Circuit expressed concern that if a PRP were allowed to seek contribution under § 107, the contribution defense of § 113(f)(2) could be circumvented, or read out of the statute. *In re Reading Co.*, 115 F.3d 1111, 1119 (3rd Cir. 1997). Under § 113(f)(2), any party who resolves its liability to the government in an administrative or judicially approved settlement has a defense against contribution claims brought by other PRPs regarding any matters addressed in the settlement. 42 U.S.C. § 9613(f)(2). To the extent that *Reading* would find fault with our construction because it suggests the availability of a "§ 107 contribution action" for certain PRPs, we believe the Third Circuit's concern reflects a misconception of the relationship between §§ 107 and 113. Our construction of the statute does not divide contribution actions into § 113 actions and § 107 actions depending on the procedural posture

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[4] "Orphan shares" are those shares of the waste responsibility which are attributable to PRPs who either are insolvent or cannot be located or identified. *Pinal Creek*, 1997 WL 362462, at *5.

of the plaintiff PRP. On the contrary, our holding merely recognizes that while all actions by and between jointly and severally liable PRPs are "actions under § 107" for purposes of liability, they are all still contribution actions governed by § 113(f). By its terms, the contribution defense embodied in § 113(f)(2) is applicable to any claim for contribution. Thus, regardless of whether the plaintiff PRP incurred costs pursuant to a civil action or through some other proceeding, any defendant PRP who has resolved its liability to the government in an administrative or judicially approved settlement may invoke the contribution defense contained in § 113(f)(2).

III

PRPs who have contributed to the waste at a site may recover from other PRPs that portion of their cleanup costs which exceeds their pro rata share. Such an action is "the quintessential claim for contribution." *Colorado & Eastern,* 50 F.3d at 1536, and is governed by the equitable principles of § 113(f). A PRP who incurred cleanup costs pursuant to a civil action under §§ 106 or 107 will have its contribution claim governed by the three year limitations period set out in § 113(g)(3). A PRP who incurred cleanup costs in some other way, such as pursuant to an EPA unilateral administrative order, will have its contribution claim governed by the limitations period in § 113(g)(2), which governs "initial actions" for recovery of such costs. Accordingly, we AFFIRM the district court's dismissal of Plaintiffs' traditional cost recovery action under § 107. We REVERSE the district court with respect to Plaintiffs' § 113(f) contribution claims, and REMAND for further proceedings.

APPENDIX B

[Filed Mar. 20, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-820-K

SUN COMPANY, INC. (R&M),
a Delaware corporation,
and TEXACO, INC.,
a Delaware corporation,
Plaintiffs,

vs.

BROWNING-FERRIS, INC.,
a Delaware corporation, *et al.*,
Defendants.

ORDER

Now before this Court is the motion for summary judgment by Defendant Group II ("Defendants")[1] against Plaintiffs Sun Company, Inc. and Texaco, Inc. ("Plaintiffs"). Plaintiffs brought this action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*,

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[1] Defendant Group II members include: Atlantic Richfield Company, Bankoff Oil Co., Inc., Beverage Products Corp., Borg Industrial Group, Inc., d/b/a American Container Services, Browning-Ferris, Inc., Consolidated Cleaning Service Co., Cowen Construction, Charles Forhan, d/b/a D & W Exterminating, National Tank Co., Oil Capital Trash Services, Inc., Peevy Construction Co., Inc., Public Service Co. of Oklahoma, Steve Richey d/b/a Richey Refuse Service, City of Sand Springs, John D. Shipley, Monte Shipley, Shipley Refuse, Robert E. Sparks, d/b/a Tulsa Industrial Service, Sun Chemical Corporation, Union Carbide Corp., and Waste Management of Oklahoma, Inc., successor to Tulsa Industrial Disposal Services.

for costs expended by Plaintiffs in response to an order by the Environmental Protection Agency ("EPA") to perform remediation at the Compass landfill site ("the Site"), pursuant to section 106 of CERCLA, 42 U.S.C. § 9606. Plaintiffs also seek a declaratory judgment declaring their right to recover past and future response costs attributable to cleanup of the Site. In addition, Plaintiffs assert state law claims of contribution and/or indemnity against Defendants.

I. Facts

The Site is a piece of property situated on the south bank of the Arkansas River in Tulsa County. It is an abandoned limestone quarry that was operated as a permitted landfill from 1972 to 1976. During the time of its operation, material containing hazardous substances within the meaning of CERCLA section 101(14), 42 U.S.C. § 9601(14), were delivered to the Site. This material began to be released into the soil, surface water, and groundwater near and beneath the Site. The EPA found amounts of hazardous substances in the soil and groundwater beneath the Site, including chemicals listed as hazardous substances within the meaning of section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

In September 1984, the EPA placed the Site on the National Priority List. 40 C.F.R. Part 300, App. B. On September 29, 1987, the EPA issued a Record of Decision ("ROD"), which selected a remedy for the site that was deemed by the EPA and the State of Oklahoma to be consistent with CERCLA and the National Contingency Plan ("NCP"), 33 U.S.C. § 1321(c); 42 U.S.C. § 9605; 40 C.F.R. Part 300, *et seq.* The remedy selected by the EPA specified a "RCRA" quality cap or cover to be placed over the contaminated material, with a synthetic liner between the cap and the contaminated materials to prevent seepage or drainage of rainwater, installation and monitoring of wells for purposes of compliance monitoring of groundwater, site grading, diversion of surface

water, air emissions monitoring, installation of fences and signs along the perimeter of the cap, monitoring of the Site for a period of 30 years to ensure that no significant contamination concentrations migrate from the Site, and if necessary, collection and on-site treatment of contaminated groundwater. On May 31, 1989, in a Unilateral Administrative Order styled, *In the Matter of Braniff, Inc., et al.*, United States Environmental Protection Agency, Region 6, Dallas, Texas, Docket Number CERCLA VI-05-89, the EPA ordered Plaintiffs, pursuant to section 106 of CERCLA, 42 U.S.C. §9606, to remediate the Site as set forth in the ROD. Plaintiffs Sun and Texaco agreed to perform the remediation in compliance with the Administrative Order and ROD. Plaintiffs began remediation activities in January 1990. Response actions were completed on or by August 29, 1991. Plaintiffs incurred response costs as a result of the Administrative Order.

Plaintiffs filed the instant action on August 29, 1994, seeking to recover from Defendants the costs that Plaintiffs expended in response to the Administrative Order and seeking a declaratory judgment allocating liability for past and future response costs.

II. Discussion

A. Summary Judgment Standard

Summary judgment, pursuant to Fed. R. Civ. P. 56, is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Windon Third Oil and Gas v. Federal Deposit Insurance Corporation*, 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987). The Supreme Court explains:

> [T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for

> discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322. "The questions of statutory construction and legislative history raised herein present legal questions properly resolved by summary judgment." *State of Oklahoma v. Weinberger*, 741 F.2d 290, 291 (10th Cir. 1983), *cert. denied sub nom Farrah v. United States*, 466 U.S. 971 (1984) (citing *Union Pacific Land Resources Corporation v. Moench Investment Company, Ltd.*, 696 F.2d 88 (10th Cir.), *cert. denied*, 460 U.S. 1085 (1982)).

B. CERCLA Causes of Action

The first issue is which causes of action are available to Plaintiffs under CERCLA, as amended by the Superfund Amendment and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613 (1986). In *United States v. Colorado & Eastern Railroad*, 50 F.3d 1530 (10th Cir. 1995), the Tenth Circuit explained that CERCLA provides two types of legal actions by which parties can recoup some or all of their costs associated with hazardous waste cleanup: cost recovery actions under CERCLA section 107(a), 42 U.S.C. § 9607(a), and contribution actions under CERCLA section 113(f), 42 U.S.C. § 9613(f). *Id.* at 1535. Plaintiffs assert causes of action under both sections; Defendants contend that Plaintiffs can only bring a section 113(f) contribution action.

Although the circuits are divided, the Tenth Circuit has decided this question, and this Court must follow the precedent of the Tenth Circuit regardless of this Court's views concerning the advantages of the precedent of our sister circuits. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990). In *Colorado & Eastern*, the Tenth Circuit held that "claims between [Potentially Re-

sponsible Parties ("PRPs")] to apportion costs between themselves are contribution claims pursuant to § 113 regardless of how they are pled." *Colorado & Eastern Railroad*, 50 F.3d at 1539. Therefore, the only cause of action available to a PRP seeking to recover from another PRP for cleanup costs is a § 113(f) contribution action. *Id.* at 1536. *See also Bancamerica Commercial Corp. v. Trinity Industries*, 900 F. Supp. 1427, 1450 (D. Kan. 1995) ("The Tenth Circuit recently held that when one potentially responsible party sues another to recover expenditures incurred in cleanup and remediation, the claim is one for contribution and is controlled by § 113(f).") (Citing *Colorado & Eastern*).

There is no genuine issue as to the classification of Plaintiffs as PRPs under CERCLA section 107(a), 42 U.S.C. § 9607(a). Although Plaintiffs apparently dispute, parenthetically, that they are PRPs (Plaint. Resp. at 5), they concede that they generated wastes containing hazardous substances that were transported to the Site. (*See* Plaint. Resp. at 4 (not disputing Defendants' statement of undisputed material fact No. 7).)[2] "Generator" or "arranger" liability under section 107 (a)(3) of CERCLA is imposed on

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or teratment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .

42 U.S.C. § 9607(a)(3).

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[2] *See also* EPA's First Amended Unilateral Order, attached at Def. Br. Supp. Summ. J. Ex. A at 9-11 (classifying Sun and Texaco as responsible parties pursuant to section 107 of CERCLA); Plaintiffs' Allocation Sheet, attached at Def. Br. Supp. Summ. J. Ex. C (listing selves as PRPs); EPA Allocation Sheet, attached at Def. Br. Supp. Summ. J. Ex. D (listing Plaintiffs as PRPs).

Courts have construed this section broadly in holding generators liable under CERCLA. *See United States v. Hardage*, 750 F. Supp. 1444, 1458 (W.D. Okla. 1990); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (noting that courts have concluded that a liberal judicial interpretation of arranger liability provision is consistent with CERCLA's remedial statutory scheme). A generator need not have selected the site; indeed, courts have held defendants "arranged for" disposal of wastes at a particular site even when defendants did not know the substances would be deposited at that site or in fact believed they would be deposited elsewhere. *See id.* at 1381; *United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985); *State of Missouri v. Independent Petrochemical Corp.*, 610 F. Supp. 4, 5 (E.D. Mo. 1985); *United States v. Wade*, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983).

Under CERCLA, a party who generates hazardous substances and arranges for their disposal is strictly liable for all costs of remediating environmental damages at the site where the substances ultimately are deposited, regardless of whether the party was at fault or whether the substance actually caused or contributed to any damages. *See St. Paul Fire and Marine Ins. v. Warwick Dyeing*, 26 F.3d 1195, 1197-98 (1st Cir. 1994). Since Plaintiffs admit generating the substances that were transported and ultimately deposited at the Site, and since Plaintiffs' wastes were by their own estimation present at the Site at the time of the cleanup, and given the fact that Plaintiffs have proffered no evidence, nor even a cogent argumnet, contrary to a finding that they are PRPs, this Court finds that Plaintiffs are PRPs. *See Cook v. Jackson Nat. Life Ins. Co.*, 844 F. Supp. 1410, 1412 (D.Colo. 1994) (holding that party opposing summary judgment motion "must produce specific facts showing that there remains a genuine issue of material fact for trial;" mere assertions not enough to survive summary judgment) (citing *Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir.

1988)).[3] Therefore, since the instant CERCLA action involves PRPs seeking to recover from other PRPs for cleanup costs, Plaintiffs are limited to a contribution action pursuant to CERCLA section 113(f). *See Colorado & Eastern Railroad*, 50 F.3d at 1536, 1539.

Plaintiffs contend that under *Key Tronic v. United States*, 114 S.Ct. 1960 (1994), they are entitled to bring both a CERCLA section 107(a) action as well as a section 113(f) action, and that *Colorado & Eastern* can be distinguished from the instant case. In *Key Tronic* the Court considered whether CERCLA permitted the recovery of attorney fees; the Court did not focus on the exclusivity of section 113 actions in disputes between PRPs. The Court indicated that with the passage of SARA, both sections 107 and 113 provide a cause of action for private parties seeking to recover cleanup costs. "[T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Id.* at 1966. Plaintiffs contend that *Key Tronic* supports their argument that both sections 107 and 113 provide viable causes of action in the instant case.

This Court does not believe *Colorado & Eastern* is distinguishable from the instant case; therefore, *Colorado & Eastern* controls.[4] Plaintiffs point to the fact that *Key Tronic* involved a claim for response costs incurred independently of a civil action, as in the instant litigation; whereas, *Colorado & Eastern* involved claims asserted

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[3] Since Defendants' status as PRPs is a condition precedent to recovery by Plaintiffs under CERCLA, it is assumed for purposes of this order that Defendants are PRPs as well.

[4] Moreover, this Court presumes that *Colorado & Eastern* is consistent with *Key Tronic* which was decided nine months prior to *Colorado & Eastern*. *See also United Technologies Corp. v. Browning-Ferris Industries*, 33 F.3d 96, 103 n.12 (1st Cir. 1994) (noting that its holding that a PRP was limited to a § 113(f) contribution action was consistent with *Key Tronic*), *cert. denied*, 115 S.Ct. 1176 (1995).

subsequent to a civil action. Without pointing to language by either the Supreme Court or Tenth Circuit, Plaintiffs argue that when, as here, a party incurs response costs *prior* to a civil action, it may bring either a section 107 or 113 action (or both) against other PRPs; whereas, when a party incurs response costs *subsequent* to a civil action, it may only bring a section 113 action. The Tenth Circuit, however, makes no such distinction. It states simply, "Whatever label [Appellee] may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Colorado & Eastern*, 50 F.3d at 1536. Noting that the two parties were PRPs, the Court held that any claim that would reapportion costs between them "is the quintessential claim for contribution." *Id.* at 1536 (citing Restatement (Second) of Torts § 886A and *Amoco Oil Co. v. Borden Inc.*, 889 F.2d 664, 672 (5th Cir. 1989)).[5] Since the instant case involves claims between PRPs to apportion costs between themselves, Plaintiffs are confined to bringing a section 113(f) contribution action, regardless of how they plead their claims. As a Utah district court explained, it is the parties' status as PRPs that limits Plaintiffs to a section 113 contribution claim, in accordance with *Colorado & Eastern*. *See Ekotek Site PRP Committee v. Self*, 881 F. Supp. 1516, 1521 (D. Utah 1995) (holding that cost recovery action by one PRP against another PRP is limited to a section 113(f) contribution action and declining to distinguish *Colorado & Eastern* based on whether claimant had voluntarily incurred response costs).

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[5] A civil action clearly is not a precondition for bringing a contribution action, either under CERCLA, *see* § 113(f)(1) ("Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."), or common law, *see* Restatement (Second) of Torts § 886A.

C. Statute of Limitations for CERCLA Action

Neither Plaintiffs nor Defendants dispute that the applicable statute of limitations for a section 113 contribution action is three years. *See* 42 U.S.C. § 9613(g)(3). The issue in dispute is when the statute of limitations begins to accrue. Both parties agree that under the literal terms of the statute, no triggering event has yet occurred in the present case. The statute of limitations section governing contribution actions provides as follows:

> No action for contribution for any response costs or damages may be commenced more than three years after—
>
> > (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
> >
> > (B) the date of an administrative order under section 9622(g) of this title (relating to *de minimis* settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). Plaintiffs incurred cleanup costs in response to an EPA § 106 Administrative Order, not one of the triggering events listed above.

Therefore, the question is whether the statute of limitations has yet to accrue—and as Defendants point out, may never accrue—or whether this Court must supply a triggering event for accrual of the statute of limitations. One district court in this circuit has held that when a PRP incurs response costs as a result of an EPA consent order, that PRP's subsequent contribution action is not subject to the statute of limitations because the consent order is not one of the four triggering events under CERCLA section 113(g)(3). *Ekotek Site PRP Committee v. Self*, 881 F. Supp. 1516, 1522-24 (D. Utah 1995). *See also Gould*,

Inc. v. A&M Battery and Tire Service, 901 F. Supp. 906, 914-15 (M.D. Pa. 1995) (holding that since none of the four § 113(g)(3) triggering events had occurred, plaintiff's contribution claim was not time barred).

This Court disagrees. Such a result would provide a loophole at odds with the purposes of CERCLA. The structure of the statute indicates a legislative intent to restrict cost recovery and contribution actions to definite periods of time. *See* 42 U.S.C. § 9613(g). No public policy interest consistent with CERCLA would be served by allowing certain PRPs unlimited time in which to bring a contribution action simply because they happen to incur cleanup costs in response to a particular species of governmental prodding.[6] Rather, Congress' failure to supply a triggering event for cases such as the instant one—where cleanup costs are incurred as a result of an EPA § 106 administrative order—appears to be an inadvertent omission. This Court does not discern an intent by Congress to allow PRPs in Plaintiffs' circumstances to keep other PRPs on the hook indefinitely. Indeed, there are strong public policy interests that militate against allowing parties, such as Plaintiffs, who do not enter into a settlement with the EPA but incur response costs as a result of prodding by an EPA administrative order, to evade a statute of limitations on subsequent contribution actions.

Since the CERCLA statute does not provide a triggering event for cases such as the instant one, this Court must supply one, looking to federal common law for guidance. *See Baker v. Bd. of Regents, Kansas*, 991 F.2d 628, 632 (10th Cir. 1993) ("Federal law controls questions relat-

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[6] Plaintiffs' remediation of the Site can hardly be characterized as voluntary. As Plaintiffs acknowledge, a party receiving an EPA § 106 order "is faced with little choice but to comply." (Plaint. Resp. at 3.) Challenges to ordered remedial action are limited under the statute, and penalties for noncompliance are severe. *See* 42 U.S.C. § 9606(b).

ing to accrual of federal causes of action.") (citing *Newcomb v. Ingle*, 827 F.2d 675, 678 (10th Cir. 1987)). While the Tenth Circuit has not established a federal common law rule for the accrual of contribution actions, the Third Circuit has. This Court adopts that standard: Absent a judgment, a cause of action for contribution does not arise until the party seeking contribution has paid more than her fair share of a common liability. *Sea Land Service, Inc. v. United States*, 874 F.2d 169, 171 (3rd Cir. 1989). *See also Bradford v. Indiana & Michigan Elec. Co.*, 588 F. Supp. 708, 714 (D. W.Va. 1984) (quoting *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 161 F. Supp. 452, 458 (D. Md. 1958)). *See generally*, Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run against Claim for Contribution or Indemnity Based on Tort*, 57 ALR 3d 867, 877 ("[T]he cause of action for contribution accrues—becomes a right enforceable in a court action—when one of the joint tortfeasors pays more than his proportionate share of the damages. On the date of such payment the inchoate claim ripens into maturity, and whatever the applicable period of limitations, the time then starts to run.").

D. Statute of Limitations for State Law Cause of Action

Again there is a dispute as to the applicable statute of limitations for a contribution action brought under Oklahoma law. Although section 832 of title 12 of the Oklahoma Statutes provides a right of contribution among two or more persons who become jointly or severally liable in tort for the same injury to persons or property, there is no provision within title 12 or any other statute that establishes a statute of limitations for contribution actions. Nevertheless, section 95(2) of title 12 establishes a three-year statute of limitations for "an action upon a liability created by statute other than a forfeiture or penalty." Since Plaintiffs bring a contribution claim under a statute —Okla. Stat. tit. 12, § 832 (1996)—their action falls

under the terms of the section 95(2) limitation provision.[7] Both parties agree that Oklahoma has the same accrual rule for contribution actions as that described above under federal common law. *See Wilson v. Crutcher*, 56 P.2d 416, 417 (Okla. 1936) ("[T]he statute of limitations does not begin to run against a claim for contribution until the plaintiff has discharged the common debt, or paid more than his share of it."). Therefore, Plaintiffs' state law action for contribution is under the same time limitations as their CERCLA contribution action: three years from the point in time at which Plaintiffs paid more than their fair share of the response costs.

E. Is Plaintiffs' Entire Contribution Claim Time Barred?

There remains the question of whether the three-year statute of limitations bars Plaintiffs' entire claim if they filed the instant action more than three years after they paid their pro rata share, or whether they are simply barred from recovering any costs paid prior to the three-year cutoff. While the law in the Tenth Circuit and in Oklahoma is not clear on this question, state courts in Kansas, Kentucky and Wisconsin have employed the following rule: Where one of multiple co-obligors, between whom there may be contribution, makes partial payments on the obligation, the statute of limitations begins to run as to such payments from the time he pays the creditor more than his proportion of the debt, *and runs separately on each payment made after the co-obligor pays his fair*

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[7] Plaintiffs contend that the appropriate statute of limitations is provided by a residual catch-all provision in title 12 which establishes a five-year limitations period for "[a]n action for relief, not hereinbefore provided for . . . ." Okla. Stat. tit. 12, § 95(9) (1996). Since section 95(2) clearly provides the statute of limitations in the instant case, the residual provision does not apply. Defendants argue, *inter alia*, that contribution claims are governed by the same limitation period as the underlying cause of action, citing *Gilliland v. Snedden*, 159 P.2d 734 (Okla. 1944). This Court does not read *Gilliland* to stand for that proposition.

share, and is computed separately on each payment from the date upon which it is made. See Kee v. Lofton, 737 P.2d 55, 59 (Kan. App. Ct. 1987) (citing *Robinson v. Jennings*, 70 Ky. 630 (1870)); *Bushnell v. Bushnell*, 46 N.W. 442 (Wis. 1890). In other words, if one co-obligor has made partial payments aggregating more than his share of the debt, but the statute of limitations has run as to some of those payments, he is entitled to judgment against his co-obligors for the full amount of payments on which the statute has not run, provided such sum is less than the defendant co-obligor's proportion of the debt, and the payments on which the statute has run equal or exceed the claimant's proportion. *See* 18 Am. Jur. 2d *Contributions* § 104 (1964).

This Court finds this rule just and equitable under the instant circumstances and adopts it for determining what expenditures by Plaintiffs are within the period of limitations. Although it appears that the bulk of Plaintiffs' claims for contribution are time-barred, Plaintiffs are entitled to recover by contribution any payments made within three years of their filing of the instant action, provided they paid their fair share prior to that date.

F. Declaratory Judgment

Plaintiffs seek, *inter alia*, a declaratory judgment allocating liability for past and future response costs. Defendants argue that Plaintiffs are not entitled to a declaratory judgment because they are limited to a section 113 contribution action, and CERCLA section 113(g)(2) provides for declaratory relief only in section 107 actions. Defendants are only partially correct.

Since this Court has determined that Plaintiffs are limited to a section 113 contribution action, they are not entitled to a declaratory judgment under section 113(g)(2). However, this Court retains inherent authority, absent an express statutory command to the contrary, to fashion appropriate remedies in civil suits over which

it has jurisdiction. *See* 28 U.S.C. § 2201(a).[8] This Court may enter a declaratory judgment on a question if it presents a definite and concrete controversy, touching the legal relations of parties having adverse legal interests. The controversy "must be . . . real and substantial . . . admitting of specific relief through a decree of a conclusive character." *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1273-74 (10th Cir. 1989); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). *Cf. U.S. National Bank of Oregon v. Independent Insurance Agents*, 113 S.Ct. 2173, 2178 (1993) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions.").

Given the circumstances and facts alleged in the instant case, there is no doubt that the question of what rule governs apportionment of response costs between parties presents a real and substantial controversy, touching the legal relations of parties having adverse legal interests.[9] Although it is not clear what, if any, expenses Plain-

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[8] The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

[9] Several circuits have considered whether CERCLA claims, which by their nature are often speculative, support a declaratory judgment. The Sixth Circuit noted that it is not essential that the threatened injury be absolutely immediate and real; only sufficiently immediate and real. *Kelley v. E.I. DuPont De Nemours and Co.*, 17 F.3d 836, 845 (6th Cir. 1994). *See also Emory v. Peeler*, 756 F.2d 1547, 1552 (11th Cir. 1985) (holding that a party seeking

tiffs incurred within the limitations period, Plaintiffs allege that they "will continue to incur response costs that are consistent with the NCP with respect to the site to abate the alleged release or threatened release of hazardous substances into the environment which has occurred or may occur from the site." (Third Amend. Compl. ¶ 107.) The remedy required by the EPA involves likely future expenditures, including continuing monitoring and possible future treatment. *See* discussion of required remediation *supra* page 2-3.

Therefore, since the question of the apportionment scheme for past and future response costs does present a real controversy, and a ruling will clarify a legal question at issue and mitigate uncertainty, a declaratory judgment is appropriate. *See Kunkel*, 866 F.2d at 1275. However, given the uncertainty as to the amount of response costs incurred within the limitations period, and the amount likely to be incurred in the future, this Court need not, indeed it cannot, issue a ruling defining the precise contours of an apportionment scheme. The Tenth Circuit has explained that the declaratory relief granted need not entirely dispose of the matter; necessary and proper relief based upon factual disputes not yet resolved may be sought at a later time. *Kunkel*, 866 F.2d at 1274 (citing 28 U.S.C. §§ 2201-02).

Insofar as this Court can clarify, to some degree, the legal relations between the parties, it holds as follows. Since Plaintiffs are limited to a section 113 contribution action, they are not automatically entitled to seek joint and several liability from Defendants, as are section 107 plaintiffs; rather, Plaintiffs are limited to seeking Defendants' equitable share. However, given the uncertainty as to the amount of claims available to Plaintiffs, it is not presently possible to determine what equitable factors

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declaratory relief in a CERCLA action must allege facts to support a likelihood that his opponent's injurious conduct has continued or will be repeated in the future).

should govern the apportionment of response costs. *See* 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among the liable parties under such equitable factors as the court determines are appropriate.") The Tenth Circuit has explained that a district court "has considerable discretion in apportioning equitable shares of response costs. It can allocate the response costs among the liable parties using any equitable factors it deems appropriate." *FMC Corp. v. Aero Indust.*, 998 F.2d 842, 846 (10th Cir. 1993). Analogously, this Court must consider equitable factors presented by the present case in determining what precise apportionment scheme to apply. Assuming that Plaintiff paid their fair share prior to the initiation of the three-year limitations period, the question remains whether Plaintiffs may impose joint and several liability against all Defendants for all costs incurred after that date, in which case the Defendants would bear the burden of splitting their share, or whether Plaintiffs are limited to recovering from each Defendant on a several basis.[10]

For the same reasons, it is premature to rule on the appropriate credit rule. As Judge Brett observed, a district court "has the discretion to apply the credit rule which under the facts of the instant case will best achieve the overriding purpose and objectives of CERCLA." *At-*

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[10] Several district courts that have addressed this question have limited plaintiffs pursuing a section 113 contribution action to obtaining several liability against defendants. *See Plaskon Electronic Materials v. Allied-Signal*, 904 F. Supp. 644, 651 (N.D. Ohio 1995) (noting that liability under § 107(a) is joint and several, while liability under § 113(f) is merely several) (citing *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1213-15 (N.D. Cal. 1994)); *Gould Inc. v. A & M Battery and Tire Service*, 901 F. Supp. 906, 913 (M.D. Pa. 1995) ("Since liability under a § 113 action is several, not joint and several, each party is only responsible for their proportionate share of the harm caused at the [CERCLA site]."). Nevertheless, this Court may devise an apportionment scheme based on equitable principles suitable to the circumstances of the instant case.

lantic Richfield Co. v. American Airlines, 836 F. Supp. 763, 766 (N.D. Okla. 1993). Since the actual amount in controversy is unclear, it is not possible to determine which credit rule—the proportionate rule or the *pro tanto* rule—would be most equitable and efficacious in the instant case.

III. Conclusion

Defendants' motion for summary judgment is granted in part and denied in part. Plaintiffs' first, second and third claims for relief under CERCLA section 107(a) are dismissed. Plaintiffs may pursue a CERCLA 113(f) contribution claim and state law contribution claim as to those response costs incurred within three years of the filing of the instant action—that is, on or after August 30, 1991. This Court reserves ruling on Plaintiffs' request for declaratory relief regarding the nature of Defendants' liability pending the submission of supplemental briefs by both parties detailing response costs incurred on or after August 30, 1991, as well as those costs likely to be incurred in the future, and discussing appropriate equitable factors that the Court should consider in deciding the nature of Defendants' liability and the appropriate credit rule. Parties are directed to file supplemental briefs within 30 days of the filing of this Order.

IT IS SO ORDERED THIS 19 DAY OF MARCH, 1996.

/s/ Terry C. KERN
TERRY C. KERN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-820-K

SUN COMPANY, INC. (R&M),
a Delaware corporation,
and TEXACO, INC.,
a Delaware corporation,
Plaintiffs,

vs.

BROWNING-FERRIS, INC.,
a Delaware corporation, *et al.*,
Defendants.

May 20, 1996, Decided
May 21, 1996, FILED

ORDER

Now before this Court is the motion by Plaintiffs Sun Company, Inc. and Texaco, Inc. for reconsideration of this Court's Order of March 21, 1996. Plaintiffs' motion raises several issues of contention. Plaintiffs disagree with this Court's ruling that they are not entitled to bring an action under CERCLA § 107, 42 U.S.C. § 9607. And with respect to their remaining cause of action under

CERCLA § 113, 42 U.S.C. § 9613, Plaintiffs take exception with the accrual rule devised by the Court for the statute of limitations.[1]

At the outset, this Court reaffirms its ruling that the Tenth Circuit has unequivocally decided the question of whether a CERCLA § 107 action is available to PRPs, such as Plaintiffs, seeking to reapportion response costs among other PRPs. In *United States v. Colorado & Eastern Railroad*, 50 F.3d 1530, 1539 (10th Cir. 1995), the Tenth Circuit foreclosed § 107 actions to such claimants, and this Court is duty-bound to follow the circuit, notwithstanding Plaintiffs' public policy arguments to the contrary. *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990).

Plaintiffs are therefore limited to a CERCLA § 113 contribution action. This Court held that the three-year statute of limitations for Plaintiffs' § 113 contribution action accrued once they had paid more than their fair share of the common liability. Plaintiffs disagree. They advance an interpretation of CERCLA whereby the statute of limitations potentially would never accrue against PRPs, such as Plaintiffs, who incur response costs pursuant to a § 106 unilateral administrative order. In other words, under Plaintiffs' literal construction of the statute, CERCLA provides for a three-year statute of limitations for contribution actions that in some instances never begin to run.

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[1] Plaintiffs also suggest in a footnote that this Court applied the wrong statute of limitations. Plaintiffs contend that the proper statute of limitations for their contribution action is six years, pursuant to § 113(g)(2)(B). As Defendants correctly point out, § 113(g)(2)(B) establishes a six-year statute of limitations for a § 107 action, which this Court determined is not available to Plaintiffs. Since Plaintiffs are limited to bringing a § 113 contribution action, they are subject to the three-year statutory period established in § 113(g)(3).

This position is untenable in light of both general principles of law and the structure and purpose of the CERCLA statute. The Supreme Court has explained,

> Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322, n. 14, 92 S. Ct. 455, 464, n. 14, 30 L. Ed. 2d 468 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 1054, 13 L. Ed. 2d 941 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 1142, 89 L. Ed. 1628 (1945); *Missouri K. & T.R. Co.* v. *Harriman*, 227 U.S. 657, 672, 33 S. Ct. 397, 401, 57 L. Ed. 690 (1913); *Bell v. Morrison*, 26 U.S. 351, 1 Pet. 351, 360, 7 L. Ed. 174 (1828).

United States v. Kubrick, 444 U.S. 111, 117, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979).

These principles clearly informed the drafting of CERCLA, which establishes specific and definite statutes of limitations for the various causes of actions available under its terms. This Court held, therefore, that to construe the statute, as Plaintiffs do, to give a certain species

of claimants unlimited time to bring a contribution action would frustrate CERCLA's legislative purpose. Consequently, this Court endeavored to interpret the CERCLA statute in a manner consistent with its overriding purpose in order to avoid such an absurd result. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982) (holding interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available). Referring to federal common law for guidance in deriving an operable statute of limitations for actions such as Plaintiffs', *see Baker v. Bd. of Regents, Kansas*, 991 F.2d 628, 632 (10th Cir. 1993), this Court held that the statute of limitations for Plaintiffs' contribution action would accrue once they had paid more than their fair share of the common liability. *See Sea Land Service, Inc. v. United States*, 874 F.2d 169, 171 (3rd Cir. 1989).

Plaintiffs assert that it is unfair and inconsistent with CERCLA's statutory scheme to trigger a three-year statute of limitations against a party who has incurred response costs "prior to a fixed determination of liability." (Plaint. Br. Mot. Recon. at 6.) This Court does not agree. Parties who have incurred response costs pursuant to an EPA unilateral administrative order have ample notice that they must seek contribution from other PRPs. Under the accrual rule devised by this Court, such parties have *more than* three years from the issuance of the order to file their contribution action—that is, three years in addition to the time it takes to expend more than their fair share [2]

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[2] Incidentally, this is more time than that allotted to claimants who bring contribution actions after one of the triggering events enumerated in § 113(g)(3). *Cf. Ekotek Site PRP Committee v. Self*, 881 F. Supp. 1516, 1524 (1995) (opining that claimants whose liability has been fixed by settlement as provided in § 113(g)(3) "may be required to bring any claim for contribution sooner than persons whose liability has not been so fixed").

Nor is it inconsistent with the operation of CERCLA to trigger the statute of limitations before liability is "fixed." CERCLA, as amended by the Superfund Amendment and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613 (1986), fully anticipates that the total extent of liability may not be known at the time of litigation and therefore provides mechanisms such as declaratory relief, *see* § 113 (g)(2)(B), to establish liability for costs to be incurred in the future. *See Kelley v. E.I. DuPont De Nemours and Co.*, 17 F.3d 836, 844-45 (6th Cir. 1994).[3]

For the reasons explained herein, Plaintiffs' motion for reconsideration is DENIED.

IT IS SO ORDERED This 20th day of May, 1996.

/s/ Terry C. Kern
United States District Judge

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[3] Further, as Defendants point out, even those events listed in § 113(g)(3), which trigger the running of a three-year statute of limitations, do not entirely "fix" liability. For instance, the entry of a consent decree, which is listed as a triggering event in § 113(g)(3), does not establish the liability of the settlor. *See* 42 U.S.C. § 9622(d)(1)(B), (C).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-732

TEXACO, INC., a Delaware corporation;
SUN COMPANY, INC. (R&M), a Delaware corporation,
Petitioners,

v.

BROWNING-FERRIS, INC., a Delaware corporation; STAN DOYLE; FLEMINGS ROOFING AND SHEET METAL COMPANY; GRANT GILL, doing business as Gill Sanitation; ARK WRECKING COMPANY OF OKLAHOMA, INC.; HOUSING AUTHORITY FOR THE CITY OF TULSA; INSULATION SERVICES, INC.; PEDRICK LABS; PET CARE CEMETARY; J. B. STALLINGS, doing business as Stallings Construction Company; TULSA CONSTRUCTION & MANAGEMENT, INC.; TULSA COUNTY PUBLIC FACILITIES AUTHORITY; WRG CONSTRUCTION COMPANY, INC.; ART WEEDIN; BANK IV OKLAHOMA, N.A.

Respondents.

ORDER

Filed September 11, 1996

Before TACHA, BRORBY, Circuit Judges.

This matter comes on for consideration of the plaintiffs' Petition for Leave to Appeal from Certified Interlocutory Order and the response filed thereto.

This appeal will be given an appeal number when this court is notified by th edistrict court that the fee has been paid.

Upon consideration thereof, the petition is GRANTED. The date of this order shall be deemed the date the notice of appeal was filed.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ Ellen Rich Reiter
ELLEN RICH REITER
Appeal Expediter

APPENDIX E

[Filed Aug. 1, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-820-K

SUN COMPANY, INC. (R&M),
a Delaware corporation,
and TEXACO, INC.,
a Delaware corporation,
Plaintiffs,

vs.

BROWNING-FERRIS, INC.,
a Delaware corporation, et al.,
Defendants.

ORDER

Now before this Court is the motion of Plaintiffs Sun Company, Inc. (R&M) and Texaco Inc. to amend this Court's Order of March 21, 1996, *Sun Co. v. Browning-Ferris, Inc.*, 919 F. Supp. 1523 (N.D. Okla. 1996) ("the Order"), *reaffirmed on denial of recon.*, 926 F. Supp. 170 (N.D. Okla. 1996), granting partial summary judgment for Defendants. Plaintiffs request that this Court amend the Order to include certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Specifically, Plaintiffs identify two of this Court's rulings for appellate review: first, that under *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995), Plaintiffs, as PRPs, are not entitled to assert a cost recovery action pursuant to § 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607; and second, that Plaintiffs' contribution claims prior to August 30, 1991 are time-barred under CERCLA § 113(g), 42 U.S.C. § 9613(g).

Under 28 U.S.C. § 1292(b), a federal district court may, in the exercise of its discretion, certify orders for interlocutory appeal.[1] Interlocutory appeal is warranted when three conditions exist: (1) the otherwise unappealable order involves a controlling question of law; (2) there is substantial ground for difference of opinion as to the controlling question of law; and (3) an immediate appeal may materially advance the ultimate termination of the litigation.

This Court believes that the Order involves at least one question that meets these requisite elements: when the statute of limitations under CERCLA § 113(g) accrues in cases where cleanup is compelled by a CERCLA § 106 Unilateral Administrative Order. This is certainly a controlling question of law since it governs whether most, if not all, of Plaintiffs' contribution claims are time barred. There is substantial ground as to a difference of opinion on this question since it is a matter of first impression and compelled this Court to craft a novel solution. An immediate appeal would materially advance the ultimate termination of the litigation and likely save a substantial amount of judicial time and resources. This is a complex case involving numerous parties and difficult factual questions. Plaintiffs anticipate that trial will take several months. An immediate appeal would avert the possibility of a second trial after a prodigious expenditure of the Court's and the parties' time and resources. Further, an immediate appeal would likely increase the chance of settlement, since the parties would have a better understanding of the stakes of the litigation.

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[1] 28 U.S.C. § 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

While this Court specifically identifies the CERCLA § 113(g) statute of limitations question for interlocutory appeal, this Court acknowledges that the jurisdiction of the Tenth Circuit under 28 U.S.C. § 1292(b) "is not confined to the question certified for appeal." *In Re M & L Business Machine Co.*, 75 F.3d 586, 589 n.4 (10th Cir. 1996) (citing *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269, 1272 (10th Cir.), *cert. denied*, 115 S. Ct. 317 (1994)). If the Tenth Circuit finds that a particular question other than that identified by this Court controls the disposition of the Order, the Tenth Circuit may address that question as well. *See Homeland Stores*, 17 F.3d at 1272. Although this Court believes that the first question identified by Plaintiffs—whether a CERCLA § 107 action is available to PRPs—has been addressed and answered in the negative by the Tenth Circuit, *see Colorado & Eastern*, it is certainly a controlling question in this litigation. Should the Tenth Circuit decide to reaffirm its holding in *Colorado & Eastern* or distinguish that case from the instant one, such a ruling would materially advance the ultimate termination of the litigation.

For the reasons stated herein, this Court hereby determines that the conditions for interlocutory appeal exist. Plaintiffs' motion to amend is therefore GRANTED, and the Order is hereby amended *nunc pro tunc* to include certification of interlocutory appeal under 28 U.S.C. § 1292(b).

IT IS SO ORDERED THIS 31 DAY OF JULY, 1996.

/s/ Terry C. Kern
TERRY C. KERN
United States District Judge

APPENDIX F

STATUTORY APPENDIX

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural reosurces, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

§ 9613. Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable par-

ties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal Law.

(g) Period in which action may be brought

(1) Actions for natural resources damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

APPENDIX G

ADDENDUM TO STATEMENT REQUIRED BY RULE 29.6

Corporate Entities In Which Petitioner Atlantic Richfield Company Holds Equity Interests

Agro Internacional, S. de R.L. de C.V.
Alpine Pipelines Company
Alyeska Pipeline Service Company
AM/PM Japan Ltd.
ARCO Solar Nigeria, Ltd.

Badger Lake Pipe Line Company
Black Lake Pipeline Company
Blair Athol Joint Venture
Border Pipe Line Company

Candelaris Exploration Corporation
Casitas Pipeline Company
Chartwin Enterprises Limited
China Coal Bed Methane Ltd.
Clermont Joint Venture
Coal Resources of Queensland Pty. Ltd.
Compania de Petrolea Ganso Azul, Ltda
Compania Mexicana de Petroleo El Charro S.A.
Compania Petrolera Carco
Cook Inlet Pipe Line Company
Curragh Coal Sales Co., Pty. Ltd.
Curragh Queensland Mining, Limited
Cuyama Pipeline Company

Delta Housing Inc.
Dixie Pipeline Company
Dos Pueblos Golf Links I-V, Ltd.

East Texas Salt Water Disposal Company
El-Biar Real Estate Holdings, Inc.
EnArco Resin S.p.A.
Eurogen C.V.

F & H Pipeline Company

Gordonstone Coal Management Pty., Ltd.
Gordonstone Coal Sales Pty., Ltd.
Grant Gathering Company
Greater Pacific Limited
Guangzhou Wittenberg Oil Co. Ltd.
Gulfstream Sinclair Joint Venture Co. Limited

HAB Assets, Inc.
Hutzhou Wittenberg Petroleum Supply Co. Ltd.

Inversiones ARCO. S. DE R.L. DE CV.

Jiu Feng ARCO Shipping Company, Ltd.
JSC Oil Company LUKOIL

Kuparuk Pipeline Company
Kuparuk Transportation Company
Kuparuk Transportation Capital Corporation

Little Thunder Leasing Company
Los Angeles Export Terminal, Inc.
Los Patacios Exploration Corporation
LUKARCO B.V.
LUKARCO Finance B.V.
LUKARCO Limited
LUKARCO Services B.V.
LUKOIL

Mountain Coal Company

New Cure, Inc.
Nihon Oxirane Co., Ltd.

Oliktok Pipeline Company
Olympic Pipeline Company
Orinoco Joint Venture
Oxirane Chemical Company

Pan American Petroleum Company of California
PayPoint Electronic Payment Systems, Inc.
Portview International Ltd.
POSM Delaware, Inc.
POSM II Limited Partnership, L.P.
POSM II Properties Partnership, L.P.

Prestige Stations, Inc.
Prince William Sound Oil Spill Response Corporation
Products Cogeneration Company
P.T. ARCO Chemical Indonesia

Rodas Exploration Corporation

Santa Cruz Exploration Corporation
Seaway Pipeline Company
Shine Top International Investment Limited
Silva Exploration Corporation
South Kerkennah Oil Company
Streamelec B.V.

Tertiary Services, Inc.
Texas-New Mexico Pipe Line Company
The Council for Environmentally Sound Deicing, Inc.
The Meadows Corporation
Thunder Basin Coal Company, L.L.C.
Thunder Basin Coal Holdings, Inc.
Tricentrol

Val Verde Pipeline, L.P.
Vastar Gas Marketing, Inc.
Vastar Holdings, Inc.
Vastar Power Marketing, Inc.
Ventway Pty., Ltd.

Wallani Pty., Ltd.
Western Energy Cogen, Inc.
Wilburton Hub, Inc.
Wittenberg (Hong Kong) Ltd.
Wittenberg Investments Ltd.

Zhenhai Refining and Chemical Company

Supreme Court, U.S.
FILED
JAN 15 1998
OFFICE OF THE CLERK

(2)

No. 97-995

In The

Supreme Court of the United States

October Term, 1997

BROWNING-FERRIS, INC., et al.,

Petitioners,

v.

SUN CO., INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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38 pp

STATEMENT OF ISSUE PRESENTED

WHAT IS THE APPROPRIATE STATUTE OF LIMITATIONS FOR A CONTRIBUTION ACTION UNDER CERCLA THAT IS THE "INITIAL ACTION" TO RECOVER RESPONSE COSTS PURSUANT TO CERCLA § 113(g)(2) AND THAT ARISES IN THE ABSENCE OF THE OCCURRENCE OF ANY OF THE TRIGGERING EVENTS SPECIFIED UNDER CERCLA § 113(g)(3)?

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows:

Sun Co., Inc. (R & M) ("Sun") is a wholly owned subsidiary of Sun Co., Inc., a Pennsylvania corporation with stock traded on the New York Stock Exchange. Sun Co., Inc., has no non-wholly owned subsidiaries.

Texaco Inc. ("Texaco") is a Delaware corporation with stock traded on the New York Stock Exchange. Texaco has no parents, subsidiaries or affiliates that have issued shares to the public, except Texaco Capital L.L.C. and Texaco Capital Inc.

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OPINION BELOW

Petitioners erroneously cited the opinion below. The Tenth Circuit Court of Appeals' opinion is reported at 124 F.3d 1187.

STATEMENT OF THE CASE

INTRODUCTION

This case arises out of a unique set of facts. The Tenth Circuit opinion below is the only reported or published circuit court opinion confronting the issue of the appropriate statute of limitations for a contribution action which is the "initial action" for the recovery of cleanup costs.

Petitioners seek review claiming a conflict among the circuit courts pursuant to Supreme Court Rule 10(a).[1] Petitioners argue the Tenth Circuit opinion below conflicts with decisions by the First, Third, Fifth and Eleventh Circuits regarding the delineation between contribution actions and cost recovery actions. That delineation is not the issue presented here for review. The statute of limitations issue is the only issue before this Court.

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[1] Supreme Court Rule 10(a) provides that the character of the reasons the Court considers when ruling on a petition for writ of certiorari includes:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

Respondents request this Court to recognize Petitioners' attempts to manufacture a conflict among the circuit courts. This Court should instead conserve its judicial discretion – which is reserved "only for compelling reasons" pursuant to Supreme Court Rule 10[2] – for a controversy which truly warrants this Court's time and consideration. This Court should deny the Petition.

THE FACTS

Respondents, Plaintiffs-Appellants below, Sun Company, Inc. (R & M) and Texaco Inc. (Sun and Texaco or Respondents) sued Petitioners, Defendants-Appellees below, and others, under the Comprehensive Environmental, Response, Compensation and Liability Act of 1980 (CERCLA)[3] seeking recovery of response costs incurred in cleaning up the Compass Industries, Inc. Landfill (Site) in Tulsa, Oklahoma.

The Environmental Protection Agency (EPA) requested Sun, Texaco, and other parties to clean up the Site. Attempts to negotiate a consent decree were unsuccessful. Consequently, in May of 1989, the EPA issued a unilateral administrative order under CERCLA § 106, 42 U.S.C. § 9606 (§ 106 Order). The § 106 Order directed Sun and Texaco, Braniff, Inc., Standard Royalties, Inc., Fourth National Bank of Tulsa, Billy Charles Jackson, Sr., and

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[2] "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10.

[3] 42 U.S.C. § 9601 *et seq.*

Bellamah Community Development to remediate the Site. Only Sun and Texaco complied with the § 106 Order, cleaning up the Site starting in January 1990. Sun and Texaco completed the remediation August 29, 1991.

Following the cleanup, Sun and Texaco searched for "potentially responsible parties" (PRPs) identified in CERCLA § 107(a)[4] and filed this action on August 29, 1994. Because they incurred response costs conducting the mandated remediation consistent with the § 106 Order, Sun and Texaco sued for cost recovery under CERCLA § 107(a), and contribution under CERCLA § 113(f).[5] Declaratory relief and various state law claims were also included.

Petitioners sought summary judgment before the United States District Court for the Northern District of Oklahoma (trial court) claiming two main defects in the theories of recovery advanced by Sun and Texaco. First, Petitioners claimed Sun's and Texaco's CERCLA § 113(f) contribution claim was time barred in whole or part under CERCLA § 113(g)(3).[6] Second, Petitioners claimed that, as alleged PRPs, Sun and Texaco were not legally entitled to bring a CERCLA § 107(a) response cost recovery action.

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[4] CERCLA § 107(a), 42 U.S.C. § 9607(a) (referred to as "CERCLA § 107(a)" or "§ 107(a)").

[5] CERCLA § 113(f), 42 U.S.C. § 9613(f) (referred to as "CERCLA § 113(f)" or "§ 113(f)").

[6] CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) (referred to as "CERCLA § 113(g)(3)" or "§ 113(g)(3)").

Respondents objected to Petitioners' arguments. Sun and Texaco responded that because no triggering event had yet occurred under CERCLA § 113(g)(3), the contribution claim was timely. They also explained that the right to seek contribution under CERCLA should be triggered only upon the occurrence of an event which fixes liability – an interpretation consistent with the express triggering events provided by Congress in CERCLA § 113(g)(3). Further, Sun and Texaco argued that their contribution action was the "initial action" with respect to the Site under CERCLA § 113(g)(2),[7] and was therefore subject to the six year statute of limitations contained in CERCLA § 113(g)(2). Finally, Sun and Texaco argued that permitting an alleged PRP to seek response costs from other PRPs pursuant to CERCLA § 107(a) is consistent with the plain language of CERCLA and Congress' intent in enacting CERCLA.

The trial court agreed that none of the triggering events identified by Congress in CERCLA § 113(g)(3) had occurred but concluded a gap therefore existed in the statute. Applying admiralty jurisprudence and federal common law, the trial court ruled the three year statute of limitations for CERCLA § 113(f) contribution actions accrued when the party seeking contribution has paid more than its "fair share" of a common liability.[8]

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[7] CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (referred to as "CERCLA § 113(g)(2)" or "§ 113(g)(2)").

[8] In so holding, the trial court relied on an admiralty opinion from the Third Circuit which determined a commencement date for contribution actions involving wrongful death in admiralty cases. *See Sea Land Service, Inc. v. United States*, 874 F.2d 169, 171 (3rd Cir. 1989).

The trial court also ruled Sun and Texaco could not bring a CERCLA § 107(a) cost recovery action. The trial court limited Sun and Texaco to the CERCLA § 113(f) contribution claim.

THE TENTH CIRCUIT'S OPINION BELOW

On appeal, the Tenth Circuit reversed the trial court on the statute of limitations issue and affirmed the trial court on the issue of the Respondents' cost recovery action under CERCLA § 107(a). *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), Pet. App. at 1a.

The Tenth Circuit ruled that Sun and Texaco, as potential PRPs at the Site, could not seek cost recovery under CERCLA § 107(a). The Tenth Circuit ruled Respondents' CERCLA claim against Petitioners was a claim "by and between jointly and severally liable parties, seeking equitable apportionment of a payment which [Respondents] have been compelled to make." *Id.* at 1190, Pet. App. at 8a. Such claim, the court concluded, was " 'the quintessential claim for contribution.' " *Id.* (*quoting Bancamerica Commercial Corp. v. Mosher Steel of Kansas*, 100 F.3d 792, 800 (10th Cir.), *as amended*, 103 F.3d 80 (1996)), Pet. App. at 7a. Neither Sun and Texaco nor the Petitioners appeal that portion of the Tenth Circuit's ruling.

Next, the Tenth Circuit ruled on the issue of the applicable statute of limitations for contribution actions by PRPs where none of the triggering events under CERCLA § 113(g)(3) have occurred. The court below read CERCLA's statutes of limitations so as to leave no "inadvertent gap" in the statutory language.

The Tenth Circuit acknowledged PRPs who incur "cleanup costs pursuant to a unilateral administrative order (or by a consent decree, or in some cases, voluntarily) potentially have an unlimited time in which to bring their contribution claims," because those procedures have no triggering events listed in § 113(g)(3). *Id.* at 1191, Pet. App. at 9a. However, the Tenth Circuit rejected the district court's reasoning that this anomaly was caused by an inadvertent gap in the statute requiring the adoption of a triggering event from another area of federal or state law. *Id.* at 1192, Pet. App. at 11a. Rather, the Tenth Circuit found the appropriate statute of limitations in § 113(g)(2) and applied it consistently with the language in § 113(g)(3).

The Tenth Circuit noted that Congress "did not create a new cause of action, nor did it create any new liabilities" when it enacted § 113(f). *Id.* at 1191 (*citing Bancamerica Commercial Corp.*, 100 F.3d at 800), Pet. App. at 9a. Rather, CERCLA § 113(f) specifically incorporates and expressly refers to the liabilities and costs contained in § 107(a), "as those are the costs to be equitably apportioned." *Id.*[9]

The court was careful, however, to distinguish between the two similar actions:

> While a § 113 contribution action is not a "cost recovery" action under § 107 as that action has

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[9] The Tenth Circuit cited other opinions which have reached similar conclusions regarding the interplay between CERCLA §§ 107(a) and 113(f). *Citing Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3rd Cir. 1997).

> been defined, because it does not impose strict, joint and several liability on the defendant PRPs, it *is* an action for recovery of the *costs referred to* in § 107. Under CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107, but is governed by the equitable apportionment principles established in § 113(f).

Id. (*citing Pinal Creek Group*, 118 F.3d at 1306) (emphasis in original), Pet. App. at 10a. Therefore, a contribution action between PRPs who have potential liability, as defined in § 107(a), at a Superfund site for those costs referred to in § 107(a), is governed by the equitable contribution principles of § 113(f). *Id.*

All contribution actions, however, are not governed by the same statute of limitations. *Id.* at 1192, Pet. App. at 10a. Contribution actions by PRPs in a common context, during litigation or following a judgment or settlement in a civil action, are governed by the three year statute of limitations set forth in § 113(g)(3). *Id.* Under those circumstances, if the civil suit proceeds to conclusion, the statute of limitations is triggered on the date of the judgment under § 113(g)(3)(A). *Id.* Alternatively, if a settlement is reached, the statute of limitations is triggered on the date of the administrative order embodying the settlement, or on the date of entry of a judicially approved settlement under § 113(g)(3)(B). *Id.*, Pet. App. at 11a. In addition, some settlements reached prior to litigation, i.e., *de minimis* and cost recovery settlements under § 122(g) and (h), respectively, are also covered by the three year statute. *Id.* The Tenth Circuit recognized that these triggering events have procedural safeguards – a judgment

possesses its own inherent safeguards, and these two types of settlements under CERCLA are subject to publication in the Federal Register and a 30-day notice and comment period. *Id.*[10]

Those procedural safeguards, however, are not present where a PRP incurs cleanup costs in some way other than those covered under § 113(g)(3), such as in compliance with a § 106 order, with an administrative consent order requiring cleanup work, or voluntarily. Those PRPs are not left unprotected: "PRPs who have incurred cleanup costs in some other way are also covered by the language of § 113(f): 'Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107] of this title.' " *Id.*, Pet. App. at 11a.

The Tenth Circuit rejected the district court's conclusion that a gap existed in the statute of limitations merely because PRPs may incur response costs other than as indicated in § 113(g)(3) and therefore may not be covered by those provisions. *Id.* Rather, the Tenth Circuit ruled that such PRPs are covered by the statute of limitations in § 113(g)(2), which provides the limitations period for an "initial action" for the recovery of § 107 costs. *Id.*, Pet. App. at 11a-12a.

In other words, when a PRP seeks contribution but no prior civil action has been filed under §§ 106 or 107, that PRP's contribution action is the "initial action" specified in § 113(g)(2) for the recovery of costs referred to in § 107. Such action must therefore be brought, for remedial

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[10] *See* CERCLA § 122(i), 42 U.S.C. § 9622(i).

actions, within six years after initiation of physical on-site construction of the remedial action, or, for removal actions, within three years of completion of the removal action. *Id.* at 1194, Pet. App. at 15a. Petitioners never mention this important concept in their Petition, thereby ignoring the basis of the Tenth Circuit's opinion and specific statutory language in § 113(g)(2).

Under the Tenth Circuit's ruling, there are two types of contribution actions under CERCLA. First, CERCLA provides an implied right of contribution under CERCLA § 107(a) for an "initial action" to recover response costs, which is governed by the limitations periods of § 113(g)(2). Second, CERCLA provides an express right of contribution under CERCLA § 113(f) which are not the "initial action." In this latter case, by definition, a previous action will have been filed and one of the triggering events under § 113(g)(3) will have occurred. *Id.* at 1193, Pet. App. at 13a. The two different contribution actions under CERCLA are "each governed by the same equitable rules of § 113(f) and each seeking to equitably apportion costs referred to in § 107, but governed by different statutes of limitations." *Id.*[11]

The court interpreted CERCLA's statutes of limitations to cover the entire gamut of possible contribution actions by PRPs under CERCLA, leaving no "inadvertent gap" in the statute:

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[11] In so ruling, the Court acknowledge this Court's language in *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994), where this Court recognized two "similar and somewhat overlapping" contribution actions under CERCLA §§ 107 and 113.

> This construction of CERCLA is internally consistent in its application of the language of the statute, and follows our precedents and the increasing body of law from other circuits. Together, §§ 107 and 113 allow "any person" who has incurred cleanup costs consistent with the National Contingency Plan to recover some or all of those costs from PRPs who were responsible for the waste. . . . A PRP who contributed to the waste may recover from other PRPs a portion of the costs it expended in cleaning up the site in a contribution action under § 113(f). The liability of other PRPs will be defined by § 107, but under § 113(f), that liability will be several, and the total cleanup costs – including responsibility for "orphan shares" – will be equitably apportioned among all the PRPs, with the court being able to consider any factors it deems relevant.

Id. (citations and footnotes omitted), Pet. App. at 13a-14a. This interpretation also gives effect to each section of the statute.

Petitioners claim the Tenth Circuit opinion below conflicts with opinions by the First, Third, Fifth and Eleventh Circuits that recognize "contribution and cost recovery actions are mutually exclusive and non-overlapping." Petition at p. 3. None of those circuit courts have ruled that the two actions under CERCLA are mutually exclusive and non-overlapping. Petitioners have not cited any such holding from any opinion. Also, as this Court recognized in *Key Tronic Corp.*, 511 U.S. at 816, "the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." Finally,

CERCLA § 113(f) incorporates the liabilities of § 107(a). Section 107 is substantive, defining liabilities; § 113 is procedural, providing statutes of limitations. The two sections work together and are not mutually exclusive.

ARGUMENT

I. THE CIRCUIT COURT DECISIONS WHICH PETITIONERS CLAIM CONFLICT WITH THE DECISION BELOW DID NOT INVOLVE THE STATUTE OF LIMITATIONS ISSUE RAISED BY PETITIONERS.

Contrary to Petitioners' assertions, the Tenth Circuit's opinion below does not conflict with any other circuit court opinions. The Tenth Circuit is the only circuit court to confront the issue of the appropriate statute of limitations for those contribution actions under CERCLA § 113(f) that are "initial action[s]" as provided in CERCLA § 113(g)(2) and that arise in the absence of the occurrence of any of the triggering events specified under CERCLA § 113(g)(3).

Petitioners generate an imaginary conflict among decisions of various circuit courts in hopes of convincing this Court to exercise its judicial discretion and grant certiorari. Petitioners attempt to focus this Court on language that constitutes neither the holding of the Tenth Circuit below nor the issue on appeal, and to compare that language with dicta from other circuit courts in an attempt to manufacture a conflict between the circuit courts. As will be shown, the ruling of the Tenth Circuit below tracks perfectly with the substance of the circuit

court opinions upon which Petitioners rely as grounds for manufacturing the alleged conflict.

A. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *IN RE READING CO.*

Petitioners claim the Tenth Circuit's opinion below conflicts with the Third Circuit's opinion in *In re Reading Co.*, 115 F.3d 1111 (3rd Cir. 1997). Contrary to Petitioners' assertions, the opinion below does not conflict with *Reading*.

Reading did not involve the issue of the appropriate statute of limitations for a PRP's contribution action that is the "initial action" for recovery of § 107 costs arising in the absence of the occurrence of any of the triggering events under CERCLA § 113(g)(3). In *Reading*, the lawsuit at issue against Reading Company was a contribution action arising out of an earlier CERCLA § 107(a) action filed by the United States. *Id.* at 1116. Here, there was no prior action that would give rise to the occurrence of any of the triggering events identified in CERCLA § 113(g)(3).

The question presented in *Reading* was whether Reading Company's potential CERCLA liability to the United States had been discharged in an earlier bankruptcy proceeding. *Reading*, 115 F.3d at 1117. *Reading* did not involve the statute of limitations issue for which Petitioners seek review by this Court.

Reading and *Sun Co., Inc.* both consistently stand for the proposition that PRPs suing under CERCLA are limited to contribution actions which equitably apportion liability for response costs. In *Sun Co., Inc.*, the Tenth Circuit concluded an action by a PRP to recover response costs is "the quintessential claim for contribution," "and is governed by the equitable principles of § 113(f)." *Sun Co., Inc.*, 124 F.3d at 1194 (*quoting United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995)), Pet. App. at 15a. Similarly, in *Reading*, the Third Circuit held that an action by a PRP to recover response costs under CERCLA from another PRP is a contribution action under CERCLA § 113(f)(1) and not a traditional cost recovery action under CERCLA § 107(a). *Reading*, 115 F.3d at 1119. Both opinions are consistent in their treatment of PRPs suing for recovery of cleanup costs under CERCLA. There is no need for this Court to exercise its discretionary jurisdiction.

1. THE TENTH CIRCUIT DID NOT FIND ANY CONFLICT BETWEEN ITS HOLDING BELOW AND THE THIRD CIRCUIT'S HOLDING IN *READING*.

Petitioners contend the Tenth Circuit acknowledged a conflict with the Third Circuit's opinion in *Reading*. In so arguing, Petitioners focus on one sentence in the opinion below: "To the extent that *Reading* would find fault with our construction because it suggests the availability of a '§ 107 contribution action' for certain PRPs, we believe the Third Circuit's concern reflects a misconception of the relationship between §§ 107 and 113." Petitioners omitted the Tenth Circuit's explanation of this misconception and

the harmonization of the Tenth Circuit's rationale with the rationale of *Reading*.

Rather than recognizing a conflict, the Tenth Circuit explained how its ruling was consistent with *Reading* and would not offend the contribution protection provisions of CERCLA as the Third Circuit feared. The Tenth Circuit explained:

> Our construction of the statute does not divide contribution actions into § 113 actions and § 107 actions depending on the procedural posture of the plaintiff PRP. On the contrary, our holding merely recognizes that while all actions by and between jointly and severally liable PRPs are 'actions under § 107' for purposes of liability, they are still contribution actions governed by § 113(f). By its terms, the contribution defense embodied in § 113(f)(2) is applicable to any claim for contribution. Thus, regardless of whether the plaintiff PRP incurred costs pursuant to a civil action or through some other proceeding, any defendant PRP who has resolved its liability to the government in an administrative or judicially approved settlement may invoke the contribution defense contained in § 113(f)(2).

Sun Co., Inc., 124 F.3d at 1193-94, Pet. App. at 14a-15a. In other words, the Tenth Circuit explained how its holding would not throw the proverbial monkey wrench into the works, as the Third Circuit feared, by allowing PRPs to "end run" the contribution protection provisions of § 113(f)(2) and (3). *Reading*, 115 F.3d at 1119.

There is no "expressly acknowledged" conflict between *Sun Co., Inc.* and *Reading*. No justification exists for this Court to exercise its discretionary judicial review in this case.

2. IF ANY CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT'S OPINION BELOW AND THE THIRD CIRCUIT'S OPINION IT IS ILLUSORY AND DOES NOT WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

The imagined conflict Petitioners attempt to create between the rulings of *Sun Co., Inc.* and *Reading* is spurious. Petitioners claim the conflict exists in that *Reading* concluded there is no longer an implied contribution action under CERCLA § 107(a), because Congress replaced that action with the express right of contribution under CERCLA § 113(f), *Reading*, 115 F.3d at 1119, but *Sun Co., Inc.* concluded there are two "similar and somewhat overlapping" contribution actions under CERCLA. *Sun Co., Inc.*, 124 F.3d at 1193 (*quoting Key Tronic Corp.*, 511 U.S. at 816), Pet. App. at 13a. These two concepts are not in conflict.

The end result is the same in both cases. PRPs suing other PRPs are limited to contribution actions under CERCLA that equitably apportion cleanup costs and are subject to the contribution protection provisions of CERCLA § 113(f)(2) and (3). The contribution actions recognized in both *Reading* and *Sun Co., Inc.* are identical.

The only difference between *Sun Co., Inc.* and *Reading* is that the Tenth Circuit took its decision one step further. As demanded by the question presented to the Tenth Circuit, it ruled on the issue of the appropriate statute of limitations for contribution actions that are the initial actions for cleanup costs and fall outside the express triggering events under CERCLA § 113(g)(3).

The Tenth Circuit opinion below is the only circuit court opinion which has directly confronted this issue to date. There is no reason for this Court to exercise its judicial discretion in this case.

B. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN *UNITED TECHNOLOGIES CORP. V. BROWNING-FERRIS INDUSTRIES, INC.*

Petitioners also claim the Tenth Circuit's opinion below conflicts with the First Circuit's decision in *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). Again, Petitioners attempt to create a circuit court conflict where none exists.

The First Circuit acknowledged that a situation could arise where a PRP could clean up a hazardous substance site and seek contribution in the absence of any of the triggering events contained in CERCLA § 113(g)(3), although that was not the issue presented to that court. *Id.*, at 99-100 n.8 (*citing Key Tronic Corp*, 511 U.S. at 816 (explaining that CERCLA now "expressly authorizes a cause of action for contribution in [§ 9613] and impliedly

authorizes a similar and somewhat overlapping remedy in [§ 9607]")). The First Circuit expressly recognized, however, such issue was not before it:

> If, indeed, the law allows such an implied right of action for contribution to be maintained – a matter on which we take no view – it is unclear to us whether such a cause of action would be subject to the three-year or the six-year prescriptive period. Because this appeal does not pose that question, we leave it for another day.

Id.

In other words, the precise issue raised on appeal here was recognized and left for another case by the First Circuit. There can be no conflict between two rulings where one court did not rule on the issue.

Additionally, the factual basis giving rise to the contribution actions in *United Technologies Corp.* and *Sun Co., Inc.* are distinguishable, which explains any misconceived conflict. In *United Technologies Corp.*, the PRP sought contribution more than five years after judicial approval of a consent decree – one of the four express events triggering the three year statute of limitations for contribution actions under CERCLA § 113(g)(3). *Id.* at 97. In *Sun Co., Inc.*, on the other hand, no consent decree was ever judicially approved, nor did any other triggering event specified under CERCLA § 113(g)(3) ever occur. *Sun Co., Inc.*, 124 F.3d at 1189, Pet. App. at 5a. The fact that there had been no "initial action" for response costs and none of the triggering events had ever occurred formed the basis for the Tenth Circuit's holding below. *Id.* at 1191,

Pet. App. at 8a. The facts before the First Circuit in *United Technologies Corp.* did not give rise to that issue.

As no real conflict exists between the circuits, this Court should not expend its discretionary judicial review to grant a writ of certiorari.

C. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN *OHM REMEDIATION SERVS. V. EVANS COOPERAGE CO., INC.*

Petitioners claim a conflict exists between the Tenth Circuit's opinion below and the Fifth Circuit's opinion in *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997). As with the other circuit court opinions upon which Petitioners rely as grounds for a conflict, there is no conflict between these two circuit court opinions.

The Fifth Circuit's opinion in *OHM Remediation Servs.* did not confront the statute of limitations issue decided by the Tenth Circuit below. The two issues presented to the Fifth Circuit in *OHM Remediation Servs.* were "issues of first impression in the federal courts of appeal," *id.* at 1577, and were concerned with: (1) whether a cause of action for response costs under § 107(a) was limited to persons with a "protectable interest" in a CERCLA site, *id.* at 1579; and (2) whether a contribution action under § 113(f) could be brought by a party that was not liable or potentially liable. *Id.* at 1580. No statute of limitations issue was presented to the Fifth Circuit.

There is no conflict between the Tenth Circuit's opinion below and the Fifth Circuit's opinion in *OHM Remediation Servs.* Issuing a writ of certiorari is inappropriate in this case.

D. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *REDWING CARRIERS, INC. V. SARALAND APARTMENTS.*

Petitioners also claim a conflict exists between the Tenth Circuit's opinion below and the Eleventh Circuit's opinion in *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996). To the contrary, the two opinions are wholly consistent.

In *Redwing Carriers*, the Eleventh Circuit ruled, as did the Tenth Circuit below, that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f)." *Redwing Carriers*, 94 F.3d at 1513 (*citing Colorado & Eastern*, 50 F.3d at 1535). More importantly, the Eleventh Circuit ruled that "[w]hether Redwing brings its claims under § 107(a) or § 113(f) does not matter insofar as establishing the Appellees' liability. *The elements of a claim under both sections are the same.*" *Redwing Carriers*, 94 F.3d at 1496 (emphasis added). The highlighted language is identical in substance to the Tenth Circuit's holding below:

> Under CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is

> defined by § 107, but is governed by the equitable apportionment principles established in § 113(f).

Sun Co., Inc., 124 F.3d at 1191, Pet. App. at 10a. The end result of both opinions is wholly consistent.

More importantly, the issue of the appropriate statute of limitations for a PRP's contribution action which is the initial action was not an issue presented to, or decided by, the Eleventh Circuit in *Redwing Carriers*. There is no conflict between the Tenth Circuit's opinion below and any opinion by any other circuit court.

E. THE TENTH CIRCUIT'S OPINION BELOW IS CONSISTENT WITH THE NINTH CIRCUIT'S OPINION IN *PINAL CREEK GROUP V. NEWMONT MINING CORP.*

Petitioners concede the Tenth Circuit's opinion is consistent with the Ninth Circuit's opinion in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997). Again, the statute of limitations issue presented to the Tenth Circuit below was not an issue in *Pinal Creek Group*. Instead, the issue presented there was whether a PRP could pursue a cost recovery action under CERCLA § 107(a) and thereby recover a joint and several judgment against other PRPs. *Id.* at 1299-1300.

The Ninth Circuit concluded a CERCLA claim by one PRP against another PRP is necessarily a contribution action. *Id.* at 1301. That holding, as far as it goes, is consistent with the holdings in *Reading*, 115 F.3d at 1119,

United Technologies Corp., 33 F.3d at 100-01, *Redwing Carriers*, 94 F.3d at 1513,[12] which are the circuit court opinions upon which Petitioners rely to contend a conflict exists, and with the Tenth Circuit opinion below. *See Sun Co., Inc.*, 124 F.3d at 1194, Pet. App. at 15a.

At least one district court has interpreted the holdings of the Tenth Circuit in *Sun Co., Inc.*, the First Circuit in *United Technologies Corp.*, the Eleventh Circuit in *Redwing Carriers*, and the Ninth Circuit in *Pinal Creek Group* as consistent with each other as well as consistent with the holdings of the Third Circuit in *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3rd Cir. 1997), and the Seventh Circuit in *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994). *See Town of Oyster Bay v. Occidental Chem. Corp.*, ___ F. Supp. ___, No. 94-CV-0694(FB), 1997 WL 760189, at *25 (E.D. N.Y. Dec. 5, 1997). Petitioners are apparently the only ones who perceive a conflict in the circuit court opinions.

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[12] Petitioners also rely on *OHM Remediation Servs.* to contend a conflict exists. As previously noted, *supra* Section I(C), the issues raised there are very different from the issue decided in the Tenth Circuit opinion below.

II. THERE IS NO THREE-WAY SPLIT AMONG THE CIRCUIT COURTS REGARDING THE APPROPRIATE STATUTE OF LIMITATIONS FOR A PRP'S CONTRIBUTION ACTION WHICH IS THE INITIAL ACTION ARISING IN THE ABSENCE OF ANY TRIGGERING EVENTS SPECIFIED IN CERCLA § 113(g)(3).

Petitioners claim there is a three way split of authority on the issue of the appropriate statute of limitations for contribution actions under CERCLA in the absence of the occurrence of one of the four express triggering events found in CERCLA § 113(g)(3). To the contrary, the Tenth Circuit's opinion below was the first, and still the only, circuit court opinion answering that question. The decisions to which Petitioners cite as a basis for creating this alleged conflict did not confront the question answered by the Tenth Circuit below. There is no conflict among the circuit court opinions which warrant the exercise of this Court's judicial discretion.

A. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE SEVENTH CIRCUIT'S OPINION IN *RUMPKE OF INDIANA, INC. V. CUMMINS ENGINE CO.*

Petitioners claim the Tenth Circuit opinion below conflicts with the Seventh Circuit opinion in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). *Rumpke of Indiana* did not rule on the statute of limitations issue presented for review here. The issue presented in *Rumpke* concerned the scope of the contribution protection provision of a judicially approved consent decree covering a site other than the site for which the

plaintiff sought cost recovery and contribution. In other words, no statute of limitations question was presented to the Seventh Circuit in *Rumpke of Indiana*.

The Seventh Circuit adopted the same implied contribution right recognized by *Sun Co., Inc.*:

> To the extent this looks like an implied claim for contribution, where the landowner is alleging that its share should be zero, we note that dicta in the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), suggests that the Court was not disturbed by that possibility. *See* 511 U.S. at 816, 114 S.Ct. at 1967.

Rumpke of Indiana, 107 F.3d at 1235. This language is plainly consistent with the Tenth Circuit's holding below.

As Petitioners note, the Seventh Circuit discussed statutes of limitations in dicta. Petitioners quote one sentence from *Rumpke*: "The contribution claim would not accrue until one of the events specified in § 9613(g)(2) [sic] occurred, at which time three years would be available in which to file an appropriate suit." *Id.* at 1241. The quoted language was not material to the Seventh Circuit's decision of the issue actually presented and therefore constitutes dicta. BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

Even if that dicta conflicts with the Tenth Circuit's ruling below it would not warrant the exercise of this Court's discretionary review. Dicta does not constitute a holding of a court. *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995). Until a circuit court actually rules on an issue, no precedent has been set by that

circuit court. *United States v. Ricks*, 5 F.3d 48, 50 (3rd Cir. 1993). There is no conflict between the Tenth Circuit opinion below and any other circuit court holding.

To the extent Petitioners advocate a holding similar to the dicta in *Rumpke of Indiana*, such conclusion would be inconsistent with the public policy of CERCLA. Petitioners argue "the Seventh Circuit denies non-innocent PRPs, such as plaintiffs, a remedy under CERCLA § 113(f)(1) unless a triggering event has occurred, for until that time '[t]he contribution claim would not accrue.' " Petition at p. 19 (*quoting Rumpke of Indiana*, 107 F.3d at 1241) (footnote omitted). Congress clearly did not intend to deprive certain categories of PRPs of a right of contribution when it allows "[a]ny person" to recover its response costs. CERCLA § 113(f)(1). Such an absurd result warps the language of CERCLA, disregards the "initial action" language in CERCLA § 113(g)(2), and defeats the public policy of CERCLA. *See infra* Section III.

B. A SPLIT OF AUTHORITY BETWEEN A CIRCUIT COURT AND DISTRICT COURT OPINIONS FROM OTHER CIRCUITS DOES NOT WARRANT THIS COURT'S DISCRETIONARY REVIEW.

Petitioners argue that a split exists between the Tenth Circuit opinion below and *Gould, Inc. v. A&M Battery & Tire Service*, 901 F. Supp. 906, 914-15 (M.D. Pa. 1995), and *Reichhold Chemicals, Inc. v. Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995). Even if the Tenth Circuit's opinion below conflicts with those two district court opinions, such a conflict does not warrant this Court's expenditure of its

limited judicial resources. However, the district court opinion in *Reichhold Chemicals* is not inconsistent with the Tenth Circuit's opinion.

The United States District Court for the Northern District of Florida concluded that a plaintiff's contribution action was timely where none of the triggering events had occurred. *Reichhold Chemicals*, 888 F. Supp. at 1125. The court noted, consistently with the Tenth Circuit, that "[b]y its explicit language, this limitations statute [§ 113(g)(2)] applies only to cost recovery actions under § 107." *Id.* at 1124.

Whether or not a conflict exists between the Tenth Circuit's opinion below and the opinions of two non-Tenth Circuit district courts is irrelevant. A conflict between a circuit court's opinion and one or more district courts' opinions does not warrant the issuance of a writ of certiorari. Supreme Court Rule 10(a) (the factors this Court considers when ruling on a petition for writ of certiorari include "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also* 23 James W. Moore, Moore's Federal Practice ¶ 510.21 (3d ed. 1997).

There is no split of circuit court opinions which warrants review by this Court.

III. THE TENTH CIRCUIT BELOW CORRECTLY CONCLUDED THERE IS NO GAP IN CERCLA'S STATUTE OF LIMITATIONS TO BE FILLED IN, THUS THERE WAS NO NEED TO LOOK TO A STATE'S STATUTE OF LIMITATIONS; CERCLA PROVIDES ALL THE STATUTES OF LIMITATIONS NECESSARY.

Petitioners claim the Tenth Circuit opinion below is inconsistent with the decisions of this Court which have found statutes of limitations for federal actions in state law. Petition p. 26 (*citing North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995); *Wilson v. Garcia*, 471 U.S. 261, 266-67 n.12 (1985); and *Reed v. United Transp. Union*, 488 U.S. 319, 323-24 (1989)). Each of those cases involved statutes that lacked statutes of limitations. In the case below, there are statutes of limitations in CERCLA and no gap in the statute needs to be filled by the court.

CERCLA provides all the statutes of limitations necessary. First, CERCLA provides statutes of limitations for "initial" cost recovery actions:

> An ***initial action*** for recovery of the costs referred to in section 9607 of this title must be commenced –
>
> (A) for a removal action, within 3 years after completion of the removal action . . . ; and
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . .

CERCLA § 113(g)(2) (emphasis added). Second, CERCLA provides statutes of limitations for all other actions which are not initial actions:

> No action for contribution for any response costs or damages may be commenced more than three years after –
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

CERCLA § 113(g)(3). When read together, these statutes of limitations cover the gamut of causes of actions under CERCLA and leave no "gap" to be filled in this case.

When, without an "initial action" and without any prior adjudication of liability, one PRP seeks response costs from another PRP, the first PRP's action is subject to the statutes of limitations contained in CERCLA § 113(g)(2). Under those circumstances, the first PRP must file the "initial" cost recovery action within three years after completion of a removal action or within six years after initiation of physical on-site construction of a remedial action.

Petitioners ignore the statutory language and focus on "innocent" and "non-innocent PRPs," words not found in the statute. The timing of the contribution action is the important consideration, not the status of the Plaintiff. This distinction undermines Petitioners' entire argument.

This conclusion is further supported by the language of CERCLA § 113(f) which provides that any person can

seek contribution during or following any "civil action," but does not prevent the bringing of a contribution action in the absence of a civil action under §§ 106 or 107. *See* CERCLA § 113(f). In other words, Congress recognized there would be situations, such as that presented to the Tenth Circuit below, where a contribution action might arise in the absence of the four events specified in CERCLA § 113(g)(3).

The three year contribution statute of limitations in CERCLA § 113(g)(3), on the other hand, applies when one PRP seeks response costs from another PRP as a result of money paid pursuant to one of four liability fixing events. By reading the various statutes of limitations together and in their appropriate context, there is no "gap" left by Congress for the courts to complete.

Since there was no gap in CERCLA's statutes of limitations, there was no need to turn to state law. The Tenth Circuit's opinion below was properly decided and does not conflict with opinions by this Court regarding the borrowing of a statute of limitations from state law or federal common law. Review by this Court is not necessary in this case.

Finally, the Tenth Circuit's opinion below is also wholly consistent with the public policy of CERCLA. Congress passed CERCLA with the intention of providing a "solution to the environmental and health problems created by decades of reckless and irresponsible disposal of chemical wastes." H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 62, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6139 (statement by Albert Gore, Jr.). Congress had two overriding objectives in enacting CERCLA: (1) to immediately

give the federal government the tools to promptly and effectively respond to the national hazardous waste problem; and (2) to hold those who caused chemical harm responsible for the costs associated with hazardous waste cleanup. *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1088 (8th Cir. 1995).

The Tenth Circuit's opinion below allowed for the prompt remediation of the Site, even though the parties could not negotiate a consent decree, and allows for the allocation of the costs of the remediation among those contributing hazardous substances to the Site. The Tenth Circuit's opinion below was properly decided and does not warrant review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 97-995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BROWNING-FERRIS, INC., *et al.*,
Petitioners,

v.

SUN COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

The Petition for Certiorari documents the confusion in the lower courts as to the relationship between CERCLA contribution actions under section 113(f) and cost recovery actions under section 107(a), and the appropriate statute of limitations for contribution actions. In their 29-page Opposition, respondents fail to offer even a colorable basis for harmonizing these decisions with the Tenth Circuit's. Remarkably, respondents dismiss inconvenient holdings as mere "dicta," and urge the Court to let the conflicting holdings stand because of immaterial differences in the factual background against which those rulings were rendered. These attempts to obscure (and thereby insulate from review) the basic and recurring question of statutory interpretation presented by this case should be rejected.

1. Respondents assert that this case "arises out of a unique set of facts" (Opp. 1) because it involves a cleanup performed in response to a unilateral administrative order of the Environmental Protection Agency pursuant to CERCLA § 106, 42 U.S.C. § 9606. The Court should not be misled on this point. Section 106 orders are hardly "unique." According to an EPA report for fiscal year 1996, section 106 orders were responsible for roughly 30% of the funds spent on remedial work by potentially responsible parties ("PRPs") at sites listed on the EPA's National Priority List ("NPL"). EPA, *Enforcement and Compliance Assurance Accomplishments Report: FY 1996* § 2.3, at 2-3 to 2-4 (May 1997). In monetary terms, the 70 unilateral administrative orders issued by EPA in FY 1996 translated into an estimated $196 million of cleanup costs for FY 1996 that were borne by polluters instead of federal taxpayers.[1] *Id.* at

[1] The importance of section 106 orders to federal environmental enforcement efforts is likely to increase substantially given recent guidance from the EPA encouraging its Regional Offices to "consider using CERCLA § 106(a) instead of or in addition to [Resource Conservation and Recovery Act] § 7003," 42 U.S.C. § 6973. EPA Ofc. of Enforcement and Compliance Assurance, *Guidance on*

2-4. Accordingly, cases involving section 106 orders are far from unique.

2. Turning to the case law, respondents first attempt to redefine the issues in the case. They assert, albeit nakedly, that "the delineation between contribution actions and cost recovery actions . . . is not the issue presented here for review." Opp. 1. Respondents are wrong.

The Tenth Circuit below described itself as "faced with the task of further defining and clarifying the relationship between §§ 107 and 113 of [CERCLA]." Pet. App. 3a. This is necessarily so because under section 113(g)(2) and (3), the selection of the applicable statute of limitations depends upon the relationship between the two types of CERCLA actions. The six-year limitations period held applicable below (42 U.S.C. § 9613(g)(2)(B)) explicitly applies only to "Actions for recovery of costs" (*i.e.*, cost recovery actions) whereas the limitations period that should have been applied (42 U.S.C. § 9613(g)(3)) governs "action[s] for contribution." Thus, the relationship between cost recovery and contribution actions is squarely in issue here—which is why respondents find it necessary to argue (and why the court below ruled, see Pet. App. 9a) that, for statute of limitations purposes, the two authorizing provisions of CERCLA "work together and are not mutually exclusive." Opp. 11.

3. As previously shown (Pet. 12-22), the decision below conflicts with three sets of decisions interpreting CERCLA. *First*, contrary to the Tenth Circuit's erroneous ruling that "all" actions for contribution under CERCLA "are 'actions under § 107' for purposes of liability" (Pet. App. 15a), with CERCLA § 113(f) providing "no more than a mechanism for apportioning [CERCLA]-defined costs" (Pet. App. 9a (internal quotation marks omitted)), the First, Third and Fifth Circuits

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the Use of Section 7003 of RCRA 6 (Oct. 1997). The EPA further noted that section 106 orders "provide greater incentive for the respondent to comply" given the substantially higher penalties under CERCLA for noncompliance. *Id.* at 7.

have followed the plain meaning of section 113 in reaching the opposite view.[2] *Second*, the First and Seventh Circuits have ruled, in disagreement with the court below, that the applicable statute of limitations for contribution actions is three years from the date of the occurrence of a triggering event under section 113(g)(3) and that section 113(g)(2) does not prescribe the limitations period for actions by and between PRPs.[3] *Third*, the Circuits are

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[2] *See, e.g., In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997) (holding, based on "CERCLA's plain meaning," that section 113(f) "replace[d]" the pre-SARA implied right of action for contribution under section 107(a) and thus represents "the sole means for seeking contribution"); *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) (ruling that "cost recovery and contribution actions are distinct and do not overlap"); *OHM Remediation Servs.* v. *Evans Cooperage Co.*, 116 F.3d 1574, 1582 (5th Cir. 1997) (holding that "section 113(f) was not meant to be duplicative of section 107(a)" and confers on PRPs a "cause of action" for contribution). Given these rulings—particularly the unequivocal holding in *United Technologies* that "cost recovery and contribution actions are distinct and do not overlap" (33 F.3d at 100)—respondents' assertion that "[n]one of those circuit courts have ruled that the two actions under CERCLA are mutually exclusive and non-overlapping" (Opp. 10) is simply false.

[3] *See Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) (holding that contribution claims do "not accrue until one of the events specified in § 9613(g)[(3)] occur[], at which time three years would be available in which to file an appropriate suit"); *United Techs.*, 33 F.3d at 99 (1st Cir. 1994) (holding that "the shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties . . ., while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups"); *but see* Pet. App. 12a & n.3 (ruling that section 113(g)(2) provides the applicable limitations period for contribution actions absent a triggering event under section 113(g)(3)). *Compare also id. with Gould Inc.* v. *A & M Battery & Tire Serv.*, 901 F. Supp. 906, 915 (M.D. Pa. 1995) (holding that absent such an event, a claim for contribution can never be time-barred); *Reichhold Chems., Inc.* v. *Textron, Inc.*, 888 F. Supp. 1116, 1125 (N.D. Fla. 1995) (same). These latter district court decisions are cited not as a "conflict" for purposes of this Court's Rule 10 (Opp. 24-25), but rather as an illustration that "this area of law is

in conflict over the proper interpretation of this Court's opinion in *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994).[4]

Respondents devote the bulk of their discussion (Opp. 11-25) to an effort to paper over these conflicts among the lower courts. Respondents dismiss conflicting holdings as "dicta," and, when that ploy fails, respondents attempt to distinguish the conflicting decisions on their facts. Neither tack provides any basis for ignoring the plain conflict among the lower courts on the statute-of-limitations question, as well as the larger, related question of the proper relationship between cost recovery and contribution actions.

a. Respondents' treatment of *Reading* is as audacious as it is wrong. Respondents would have this Court believe that "[t]here is no 'expressly acknowledged' conflict between [the ruling below] and *Reading*." Opp. 15. Here again, respondents claim to understand the case better than the court that actually decided it. Noting *Reading*'s holding that PRPs cannot "end run" the statutory restrictions on contribution (one of which is the three-year limitations period set forth in section 113(g)(3)) by characterizing their contribution claims as cost recovery claims, the Tenth Circuit forthrightly rejected that holding as "reflect[ing] a misconception of the relationship between §§ 107 and 113." Pet. App. 14a. If this is not an "express acknowledgment" of a decisional conflict, petitioners are at a loss to understand what is.

Respondents assert (Opp. 13) that "*Reading* and *Sun Co., Inc.* both consistently stand for the proposition that PRPs suing under CERCLA are limited to contribution actions which equitably apportion liability for response

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rife with confusion and disagreement among the lower courts." Pet. 21.

[4] *Compare* Pet. App. 13a (*Key Tronic* compels conclusion that contribution actions are cost recovery actions) *with Reading*, 115 F.3d at 1120 (3d Cir. 1997) (rejecting this interpretation of *Key Tronic*); *United Techs.*, 33 F.3d at 103 n.12 (1st Cir. 1994) (same).

costs." Indeed, respondents claim (Opp. 21) that all the decisions cited in the petition are uniform on this point. Petitioners have never suggested otherwise. As pointed out in the Petition (Pet. 2 & n.1), the courts of appeals have uniformly rejected respondents' contention below that PRPs should be permitted to seek joint and several liability against other PRPs under section 107(a). That question, however, is not presented here. The issue here—and the issue on which *Reading* and the Tenth Circuit are in acknowledged conflict—is whether a PRP can assert a claim for contribution under section 107(a) and thereby evade the restrictions on such claims contained in section 113. Obviously, the fact that all Circuits agree that joint and several liability is not available in a suit by and between PRPs provides no basis for ignoring the disagreement among appellate courts on the separate question of whether a suit for contribution lies under section 107(a), as opposed to section 113(f), in the first place.

Respondents make much of the fact that, as petitioners noted (Pet. 14), the Tenth Circuit held that, with the glaring exception of the three-year contribution statute of limitations, no limitation on contribution actions contained in section 113 can be avoided through reliance on section 107(a). Opp. 14. That fact only highlights the conflict between the decision below and *Reading*. Under *Reading*, section 107(a) can *never* be a basis for recovery in a suit by and between PRPs. To allow such recovery, the Third Circuit ruled, would contravene CERCLA's plain meaning and "throw the proverbial monkey wrench into the works" by allowing PRPs to side-step the restrictions on section 113 contribution actions. 115 F.3d at 1120. The statutory "settlement bar" rule discussed in *Reading* is one such restriction; the three-year statute of limitations is another.[5] *See* 42 U.S.C. § 9613(g)(3). By

[5] Therefore, it is immaterial that *Reading* did not involve a timeliness challenge. Like the court below, *Reading* squarely ruled on the relationship between contribution and cost recovery actions under CERCLA. This discussion was an essential part of the holding in both cases and cannot be dismissed as mere dicta.

allowing respondents, as admitted PRPs, to use section 107(a) to avoid the three-year limitations period Congress enacted for all contribution actions, the court below performed precisely the sort of end-run condemned in *Reading*.[6]

b. Faced with the First Circuit's leading decision in *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), respondents are forced to choose their adjectives carefully. They assert that the First Circuit did not "*directly* confront[]" the statute of limitations issue (Opp. 12) and that there is "no *real* conflict" between the First and Tenth Circuits (Opp. 18) (both emphases added). Such hair-splitting cannot mask the conflict between the two courts. The sole issue on appeal in *United Technologies*, as here, was whether suits by and against PRPs can be initiated outside of the three-year limitations period set forth in section 113(g)(3), on the theory that such suits are cost recovery claims subject to the six-year statute of limitations contained in section 113(g)(2). 33 F.3d at 98.

The First Circuit correctly ruled that the three-year limitations period for contribution suits is controlling in suits between PRPs, not the cost recovery statute of limitations: "[T]he shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties [*i.e.*, PRPs] . . ., while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups." 33 F.3d at 99. The Tenth Circuit below reached the opposite result, holding that the longer limitations period *can* apply to actions brought by PRPs, as long as the PRPs win the race to the courthouse. Pet. App. 15a. On

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[6] Consequently, respondents' claim that "[t]he end result is the same" under both *Reading* and the decision below (Opp. 15) is plainly wrong. Under the *Reading* rule (applied by the district court), respondents' contribution suit would be time-barred under the contribution statute of limitations; under the rule applied by the court of appeals, the suit is timely under the longer cost recovery statute of limitations.

their face, therefore, the two decisions are in conflict, and even respondents cannot bring themselves to argue that the holding in *United Technologies* is dicta.

Respondents accordingly argue (Opp. 16-17) that the First Circuit declined to decide whether its reasoning would apply in the absence of a statutory triggering event. The argument is disingenuous. As noted in the Petition (Pet. 16 n.7), the First Circuit did not decide whether the longer limitations period would be available to "a PRP who spontaneously initiates a cleanup without governmental prodding." 33 F.3d at 99 n.8. Here, as the district court itself noted (Pet. App. 25a n.6), it took significant "governmental prodding"—namely, a section 106 order by the EPA, backed by the prospect of daily fines of more than $25,000 for noncompliance (see 42 U.S.C. § 9606)—for respondents to accept responsibility for their pollution of the Site. Thus, the First Circuit did not leave open the issue decided erroneously by the court of appeals below; to the contrary, the First Circuit decided that issue, adversely to respondents here. This Court should resolve this conflict.[7]

c. Respondents take extraordinary license with the decision in *Rumpke of Indiana, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). They assert (Opp. 23) that *Rumpke* "adopted the same implied contribution right recognized by *Sun Co.*" That assertion is plainly wrong. *Rumpke* merely held that an "innocent landowner"—de-

[7] Respondents' further suggestion (Opp. 17-18) that the First Circuit would not have reached the same result in a case where no statutory triggering event has occurred likewise ignores the basis of the decision in *United Technologies*. The First Circuit held that the phrase " 'recovery of costs' " is "reiterative of the subsection heading 'Actions for recovery of costs' " and "suggests full recovery." 33 F.3d at 100. This plain meaning approach to the word "recovery" forecloses respondents' speculation. Under *United Technologies*, an action by a PRP to recover anything less than all of its costs of response simply is not an "action[] for recovery of costs"—which, after all, is why that court declined to apply the cost recovery statute of limitations and instead applied the three-year contribution statute of limitations.

fined as a party who owns a contaminated site but has "contributed nothing to the hazardous conditions" there (107 F.3d at 1240)—can bring suit for joint and several liability under section 107(a). Obviously, this carefully tailored rule is quite different from the blunderbuss approach adopted by the Tenth Circuit below. As *Rumpke* explained, the innocent landowner rule permits landowners not responsible for polluting the site "to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs (*i.e.*, where it is seeking to recover on a direct liability theory, rather than trying to divide up its own liability for someone else's injuries among other potentially responsible parties)." *Id.* PRPs, such as respondents, who do not qualify as innocent landowners under *Rumpke* "would *not* be entitled to recover under [a] § 107(a) theory," for "when two parties who both injured the property have a dispute about who pays how much—a derivative liability, apportionment dispute—the statute directs them to § 113(f) and *only* to § 113(f)." *Id.* (emphasis added).

The court of appeals below, by contrast, threw the doors to section 107(a) wide open to an entirely different type of action that is fundamentally at odds with that recognized in *Rumpke*. The implied right of action endorsed below, far from being restricted to innocent landowners, is available even to parties, such as respondents, who are admittedly guilty of polluting a site. Pet. App. 12a. In further contrast with *Rumpke*, which properly restricted section 107(a) to actions seeking to hold PRPs jointly and severally liable for the entirety of the plaintiffs' response costs, the Tenth Circuit eviscerated the express right of action for contribution in section 113(f)(1) by creating an implied federal common law right of action under section 107(a) for an equitable allocation of shared liability (*i.e.*, contribution). Pet. 22-26. Given these important differences in the two types of section 107 actions at issue here and in *Rumpke*, respondents' assertion that *Rumpke* recognized "the *same* implied contribution right" adopted below (Opp. 23 (emphasis added)) is patently false.

Equally false is respondents' claim that *Rumpke* "discussed statutes of limitations in dicta." Opp. 23. The Seventh Circuit's studied conclusion that a contribution claim "[does] not accrue until one of the events specified in § 9613(g)([3]) occur[s], at which time three years would be available in which to file an appropriate suit" (107 F.3d at 1241) was not a fleeting statement unnecessary to the holding. To the contrary, it was only proper for the Seventh Circuit to consider the effect of its recognition of innocent landowner standing under section 107(a) on the restrictions on contribution actions contained in section 113. The defendant PRPs in *Rumpke* argued that construing section 107(a) to permit suits by innocent landowners would allow innocent landowners to evade the three-year statute of limitations for contribution actions in cases where, as here and in *Rumpke* itself, no triggering event under CERCLA § 113(g)(3) has occurred. *Id.* at 1241. The court concluded that the defendants' statute of limitations arguments "provide no reason for concern": Given that a contribution claim does not accrue until a triggering event occurs, "it would therefore be impossible to use § 107(a) as a tool for obtaining an advantage for limitations purposes." *Id.* The statute of limitations issue, therefore, was essential in *Rumpke*, and that decision stands in conflict with the Tenth Circuit's below.[8]

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[8] Apparently lacking confidence in their claim that *Rumpke* was mere dicta, respondents assert that the Seventh Circuit's ruling "would be inconsistent with the public policy of CERCLA" (Opp. 24). They fail to address the obvious fact that the *Rumpke* rule *promotes* CERCLA policy by encouraging polluters targeted by the EPA promptly to settle with the agency and commence remediation instead of doing what respondents did here—namely, delay cleanup efforts until the EPA issues a section 106 order as a last resort. Pet. 19. Although respondents assert, with only a citation to CERCLA § 107(a)(4)(B), that "Congress clearly did not intend to deprive certain categories of PRPs of a right [to] contribution" (Opp. 24), the short answer is that *Rumpke* does not "deprive" PRPs of contribution rights but rather governs when those rights vest (and when those rights are time-barred). In any event, this Court has ruled that section 107(a)(4)(B) "does not expressly command"

d. Respondents do not (and cannot) deny the existence of a square split of authority in the Circuits on the meaning of language from *Key Tronic*, 511 U.S. at 816, suggesting that sections 107(a) and 113(f) are "similar and somewhat overlapping" (see *supra* n.4). As previously noted (Pet. 25 n.11), this conflict has important ramifications for the recurring problem of delineating the boundaries between cost recovery and contribution actions and determining the applicable statute of limitations. This doctrinal problem provides an additional reason for this Court to grant certiorari here, which may explain why respondents have ignored it. Petitioners also note that respondents do not defend the ruling below in light of petitioners' demonstration (Pet. 22-26) that the Tenth Circuit improperly relied on a federal common law implied right of action for contribution despite the express right of action for contribution contained in section 113(f)(1).[9]

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The petition for certiorari should be granted.

Respectfuly submitted,

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that any PRP is entitled to contribution. *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 n.11 (1994).

[9] To the extent there is any question as to the correctness of petitioners' claim (Pet. 26-28) that state law can and should be borrowed to fill the interstices of CERCLA, this case should be held pending this Court's decision in *United States* v. *CPC Int'l Inc.*, No. 97-454. In that case, the Court will decide whether state corporate law should be borrowed in determining whether the parent of a subsidiary corporation that operates a hazardous waste site can be held liable under CERCLA § 107(a)(2).